RECORD AND BRIEFS

Supreme Court, U.S.

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NO. _____

In the

Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Trinity Lutheran Church applied for Missouri's Scrap Tire Grant Program so that it could provide a safer playground for children who attend its daycare and for neighborhood children who use the playground after hours—a purely secular matter. But the state denied Trinity's application solely because it is a church. The Eighth Circuit affirmed that denial by equating a grant to resurface Trinity's playground using scrap tire material with funding the devotional training of clergy. The Eighth Circuit's decision was not faithful to this Court's ruling in *Locke v. Davey*, 540 U.S. 712 (2004), and deepened an existing circuit conflict. Three lower courts—two courts of appeals and one state supreme court—interpret *Locke* as justifying the exclusion of religion from a neutral aid program where no valid Establishment Clause concern exists. In contrast, two courts of appeals remain faithful to *Locke* and the unique historical concerns on which it relied.

The question presented is:

Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid Establishment Clause concern.

PARTIES TO THE PROCEEDING

Petitioner is Trinity Lutheran Church, Inc.

Respondent is Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources.

CORPORATE DISCLOSURE STATEMENT

Petitioner Trinity Lutheran Church is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It does not have parent companies and is not publicly held.

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INTRODUCTION

Trinity Lutheran Church applied for a state grant to fund the installation of safe rubber playground surfaces that would protect daycare and neighborhood children who use its playground. The Scrap Tire Grant Program is otherwise neutrally available to a variety of nonprofits and the state rated Trinity's grant application highly. But Trinity's attempt to participate in the program was abruptly halted when the state denied its application solely because Trinity is a church. The state based this exclusion from the program on Article I, § 7, of the Missouri Constitution, which states that "no money shall be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."

The Eighth Circuit panel majority, below, held that this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), provides the state with unfettered discretion to exclude churches from generally available public benefits. And it affirmed the dismissal of Trinity's complaint despite the nascent posture of the case, holding that it failed to state a claim upon which relief could be granted. But the panel majority's decision was not uncontested. Judge Gruender dissented and the Eighth Circuit denied rehearing en banc by a 5-5 vote, with Judges Colloton, Gruender, Riley, Shepherd, and Smith voting in favor of granting Trinity's petition for en banc review.

No public benefit could be further removed from the state's antiestablishment concerns than a grant

for safe rubber playground surfaces that serve no religious function or purpose. This Court should grant review to establish that, whatever *Locke's* scope, its holding does not apply to the wholly secular benefit of providing safe play areas for kids.

DECISIONS BELOW

The Eighth Circuit's decision affirming the judgment for Respondent is reported at 788 F.3d 779 and reprinted at Petition for Writ of Certiorari Appendix ("App.") 1a. The Eighth Circuit's order denying rehearing en banc is unreported but reprinted in App. 32a.

The District Court's opinion granting Respondent's motion to dismiss is reported at 976 F. Supp. 2d 1137 and reprinted at App. 34a. The District Court's opinion denying Petitioner's motion for reconsideration and for leave to file an amended complaint is unreported but reprinted in App. 76a.

STATEMENT OF JURISDICTION

The Eighth Circuit issued an opinion on May 29, 2015, and, by an equally divided court, denied rehearing en banc on August 11, 2015. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The text of the First Amendment to the United States Constitution is set forth in App. 85a.

The text of Article I, § 7, of the Missouri Constitution is set forth in App. 85a.

Missouri Statute §260.273, the statutory authorization for the Scrap Tire Grant Program under review, is set forth in App. 86a.

Title 10 §80-9.030 of the Missouri Code of State Regulations, the administrative regulation establishing the Scrap Tire Grant Program, is set forth in App. 89a.

STATEMENT OF THE CASE

The State of Missouri instituted a program of awarding grants to nonprofit organizations to purchase playground surfacing materials made from recycled tires. The program both benefits the environment by reducing the abundance of scrap tires and makes playgrounds safer for children.

Petitioner is a church that operates a daycare with a playground used by students and the surrounding community. The church applied for a grant to replace its rock surface with a safer rubber surface. Despite meeting all neutral criteria, the state denied the Church's application solely based on Article I, § 7, of the Missouri Constitution which prohibits government aid to churches. The Church brought suit alleging this denial violated the Free Exercise Clause and the Equal Protection Clause.

The Eighth Circuit panel majority affirmed the district court's order dismissing the Church's lawsuit over a dissent by Judge Gruender. The panel

majority, in conflict with other circuits and this Court's decision in *Locke*, held that excluding churches from an otherwise neutral and secular aid program did not violate the Free Exercise Clause or the Equal Protection Clause.

But this Court's decision in *Locke* ruled on a situation involving the historical establishment concern of funding the devotional training of clergy. *Locke* did not permit the categorical exclusion of religious groups from generally available secular benefits, like the safer playground surfaces at issue here. This Court's decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), apply when states categorically exclude churches from neutral benefits, requiring such laws to overcome the rigors of strict scrutiny.

Yet the Court below read *Locke* as essentially abrogating this rule and allowing states to single out churches for exclusion from programs generally benefitting the public. As Justice Scalia noted in dissent, *Locke's* "holding is limited to training the clergy, but its logic is readily extendible, and there are plenty of directions to go." *Locke*, 540 U.S. at 734 (Scalia, J., dissenting). Legal scholars, such as Professor Douglas Laycock, expressed similar concerns that *Locke* could be applied beyond its holding. *See* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 161-62 (2003) (noting that *Locke*, "[a]s written, ... applies only to funding the training of clergy, but it may well be extended to

all funding decisions, including discriminatory refusals to fund secular services").

Lower courts have done just that, ignoring the *Locke* opinion's context and using its holding to justify the exclusion of religious groups from secular, neutral aid programs where there is no valid antiestablishment concern. *But see* Steven K. Green, Locke v. Davey *and the Limits to Neutrality Theory*, 77 TEMP. L. REV. 913, 929 (2004) (recognizing that "while a prohibition against funding clergy activities is historically supportable, such justifications would not support a broader distinction against ... the funding of religiously based social service agencies where the funds do not support inherently religious activities").

That application of *Locke* resulted in denying a safe rubber surface to a playground here. This Court should grant the Petition to clarify the proper application of the Free Exercise and Equal Protection Clauses to cases where a state withholds a generally available secular benefit based solely on religion where there is no historical establishment concern consistent with *Locke* and this Court's longstanding precedent.

A. Factual Background

Trinity Lutheran Church operates a pre-school education and daycare center named The Learning Center. App. 99a. The Learning Center formerly operated as a separate entity but merged into the Church in 1985 and now operates as a Church ministry. App. 99a.

Like many other preschool educational facilities, The Learning Center provides a playground for the children who attend, App. 102a, and children from the surrounding community use it as well, App. 133a. The playground surface of pea gravel and grass does not adequately protect the children who play there. App. 132a. The hard, jagged edges of the pea gravel shift away from the play equipment thereby posing a safety risk to children. App. 132a.

In 2012, the Church learned about the State of Missouri Scrap Tire Program, which provides grants for certain nonprofit organizations to purchase rubber pour-in-place playground surfaces made from recycled tires. App. 102a. The state funds the program through a fee imposed on the sale of new tires, *see* Mo. Stat. 260.273(6)(2), and the state uses the program to reduce the amount of used tires in landfills and illegal dump sites. App. 86a-88a. The Missouri Department of Natural Resources ("DNR") administers the Scrap Tire Program. App. 89a.

The Church submitted an application for a scrap tire grant to resurface its playground, which described the safety hazards it experienced:

> The pea gravel surface continually migrates away from critical play areas, especially under the swing sets and slide units and climbing units. [The Learning Center] has placed rubber mats in critical areas but the pea gravel continually erodes from under the mats and creates a trip hazard. The pea gravel is unforgiving if/when a child falls

and thereby poses a basic safety hazard.

App. 132a.

The Church also noted that the pour-in-place rubber playground surface was ADA-compliant and would ease and increase access to the playground. *Id.* The Church also highlighted the fact that increasing the safety of the playground with rubber surface material would benefit not only the students of The Learning Center, but also children from the community who use the playground after hours. *Id.*

The DNR ranks each application for the Scrap Tire Program because it only awards a certain number of grants per year. App. 103a. The DNR received forty-four applications the year that Trinity applied. App. 154a. The DNR ranked the Church's application fifth out of the forty-four applications. App. *Id.* The DNR awarded fourteen grants that year but denied Trinity a scrap tire grant solely because it is a church. *Id.*

The DNR notified the Church by letter, which explained:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any

church, sect, or denomination of religion...."

App. 152a-153a.

B. Procedural Background

Trinity filed a complaint in the U.S. District Court for the Western District of Missouri on January 25, 2013, alleging that the DNR's policy of denying scrap tire grants to churches violated the Free Exercise, Equal Protection, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the United States Constitution, as well as the Missouri Constitution, Article I, § 7. Trinity's complaint was an as-applied challenge, focusing on the DNR's policy and its application to Trinity. Trinity did not bring a facial challenge to the Missouri Constitution, Article I, § 7.

The district court dismissed Trinity's complaint in its entirety. App. 34a. It rejected Trinity's free exercise claim, reasoning that the Scrap Tire Program involved a direct payment of funds to a sectarian institution that raised "antiestablishment concerns that are at least as comparable to those relied on by the Court in *Locke*." [1] App. 54a. The

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[1] Because the complaint was dismissed in its entirety, Trinity filed a motion for reconsideration and for leave to file an amended complaint. It sought to add new allegations relating to newly discovered evidence consisting of a list of past grant recipients that included churches. The District Court denied the Motion. App. 76a. Whatever the DNR's policy was in the past, the current DNR policy Trinity challenged here excludes all churches from participation in the Scrap Tire Program. *See* App. 152a-153a.

district court also cited *Locke* for the proposition that Trinity's failure "to allege a violation of the Free Exercise Clause" mean that its "Equal Protection claim must also be dismissed." App. 69a.

Trinity appealed to the Eighth Circuit which issued a divided panel opinion affirming the district court's dismissal of Trinity's Complaint. App. 1a. The panel opinion incorrectly characterized Trinity's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution. App. 6a. This was despite the fact that the Complaint brought an as-applied challenge and explicitly stated so several times. *See, e.g.* App. 106a, 111a, 112a (alleging "Defendant['s] ... unconstitutional application of" Article I, § 7); App. 109a, 110a (challenging "Defendant's actions in unconstitutionally enforcing the [Article I, § 7] by denying Plaintiff's grant application").

The Complaint further requested limited relief that applied only to Trinity Lutheran. *See* App. 116a (requesting declaration that the DNR's denial of its grant application was unconstitutional); *Id.* (requesting injunctive relief only to prohibit the DNR from denying Trinity Lutheran's participation in the grant program); *Id.* (requesting the court "[d]eclare that [Article I, § 7] was unconstitutional as applied to deny Plaintiff's 2012 grant application").

Judge Gruender, in dissent, noted the panel majority's error:

> But Trinity Lutheran does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to

> bring an as-applied challenge; the complaint says so numerous times.... This claim and relief only implicate Trinity Lutheran. Consequently, Trinity Lutheran does not contend that Article I, § 7 of the Missouri Constitution is unconstitutional in all of its applications."

App. 24a.[2]

Based on *Locke*, the Eighth Circuit panel majority held that the exclusion of churches from the Scrap Tire Grant Program was justified because there was no "break in the link" between state funds and religion. App. 10a. The Eighth Circuit was concerned about "the direct grant of public funds to churches, another of the 'hallmarks of an 'established' religion,'" regardless of the secular use to which those funds are put. *Id.* Like the district court, the Eighth Circuit panel majority cited *Locke* for the proposition that "the absence of a valid [f]ree [e]xercise claim" required the dismissal of Trinity's equal protection claim as well. App. 12a.

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[2] The panel majority's mischaracterization of Trinity's Complaint as a facial attack on Article I, § 7, of the Missouri Constitution led it to point to the three-judge district court opinion in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974) (without opinion), as controlling adverse precedent. App. 7a. Because Trinity never argued that Article I, § 7, was facially invalid, the panel majority's discussion of *Luetkemeyer* is irrelevant. Moreover, *Luetkemeyer* addressed a difference in treatment of public and private schools, not discrimination between private secular and private religious schools, which is an entirely different issue.

Judge Gruender dissented because this Court's reasoning in *Locke* means that "Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause." App. 23a. Judge Gruender also correctly noted: "*Locke* did not leave states with unfettered discretion to exclude the religious from generally available public benefits." App. 26a. He explained that: "[i]f giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be." App. 29a.

Trinity filed a motion for rehearing en banc that was denied by an equally divided court. App. 32a-33a. Judges Colloton, Gruender, Riley, Shepherd, and Smith voted to grant rehearing en banc. *Id.*

REASONS FOR GRANTING THE WRIT

I. This Case Presents the Important Question of Whether *Locke* Justifies State Exclusions of Churches From Neutral Programs Raising No Establishment Clause Concerns.

The Eighth Circuit's decision here undermines protections for churches and other religious groups this Court has recognized under the Free Exercise Clause and the Equal Protection Clause. Generally, states may not specifically exclude religious groups from neutral programs absent a compelling state interest implemented by the least restrictive means. *See Church of the Lukumi,* 508 U.S. at 532-33; *see*

Emp't Div., 494 U.S. at 877.

The Eighth Circuit deviated from that general rule by elevating *Locke*'s ruling from its unique setting to swallow the protections for religious groups under the Free Exercise and Equal Protection Clauses. States can now justify disparate treatment and the exclusion of religious groups from generally available government programs simply by invoking the state establishment clause.

This Court should grant review to resolve an important issue of federal law among which there is a 3-2 conflict among the lower courts: whether states have unfettered discretion to withhold generally available benefits solely on the basis of religion where there is no Establishment Clause violation or historical concern.

The panel majority's decision in this case sides with the First Circuit and the Colorado Supreme Court and deepens a circuit conflict with the Seventh and Tenth Circuits. Its holding deviates from *Locke* and that decision's historical concern related to state aid for the devotional training of clergy. In the First and Eighth Circuits—and the state of Colorado—any wholly secular benefit is now an opportunity for states to single out churches, and potentially all religious groups for exclusion. And while this case involves scrap tire grants, nothing prohibits the state from applying its constitution to deny routine benefits—such as sewer and water service, and police and fire protection—to religious groups. This Court should grant review to clarify that the unique historical concerns underlying *Locke* do not insulate

all state religious exclusions from free exercise and equal protection challenges, and to restore the proper balance between the Religion Clauses.

II. The First and Eighth Circuits, as well as the Colorado Supreme Court are in Conflict with the Seventh and Tenth Circuits Regarding Whether *Locke v. Davey* Allows for the Exclusion of Religion from Otherwise Neutral Aid Programs.

The lower courts are in conflict regarding the proper interpretation and application of *Locke* to secular and otherwise neutral programs that exclude religion. As explained more fully below, this Court held in *Locke* that the State of Washington could deny scholarships to students who were pursuing a devotional theology degree. *See* 540 U.S. at 715. Critical to this Court's holding was the fact that the scholarship would go to fund the devotional training of clergy, an area where the state's antiestablishment concerns were historically high. *Id.* at 721-22. This Court noted that there was no animus toward religion in the history, text, or operation of the scholarship program, *id.* at 725, and that the scholarship program went a long way toward including religion in its benefits, *id.* at 724.

This Court upheld the State of Washington's religious exclusion because it fell within the "play in the joints" between what the Establishment Clause allowed and what the Free Exercise Clause required. *Id.* at 718-19, 725. But this Court was careful to note that the only interest at stake was the state's interest in not funding the devotional training of

clergy and that its opinion was not to be construed to justify exclusions based on any interest a state's "philosophical preference" might command. *Id.* at 722 n.5.

The lower courts have now had over ten years to apply *Locke*. They have done so inconsistently and, as in this case, in ways that are not faithful to the particular historical concern at issue in *Locke*—the religious training of ministers.

A. The First and Eighth Circuits, and the Colorado Supreme Court, Hold that *Locke* Allows for the Exclusion of Religion from Otherwise Neutral Aid Programs.

As the Tenth Circuit noted in *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008): "The precise bounds of the *Locke* holding ... are far from clear." This lack of clarity has led to substantial confusion in lower courts.

Three lower court decisions show this lack of clarity. In addition to the *Trinity Lutheran* decision by the Eighth Circuit, the subject of this petition, the First Circuit and the Colorado Supreme Court have misapplied *Locke* and converted it into a rule generally justifying state exclusions of churches and other religious groups from neutral state programs.

First Circuit

In *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 355 (1st Cir. 2004), the

First Circuit read *Locke* "broadly" to uphold a state's decision to categorically exclude the funding of sectarian schools from an otherwise neutral aid program. As the Tenth Circuit noted, the First Circuit "went well beyond the holding in *Locke*. Rather than declining to fund 'particular categories of instruction,' the state in *Eulitt* declined funding the entire program of education at the disfavored schools, based on their religious affiliation." *Colorado Christian*, 534 F.3d at 1256 n.4.

The First Circuit upheld the exclusion of sectarian schools from the funding program by looking solely at whether the program was motivated by religious animus. *Id.* at 355-56. In the First Circuit's view, the following factors taken from *Locke* "articulate a test for smoking out an anti-religious animus:"

> [A]n inquiring court must examine whether the state action in question imposes any civil or criminal sanction on religious practice, denies participation in the political affairs of the community, or requires individuals to choose between religious beliefs and government benefits.

Id. at 355. As long as no animus is present, the First Circuit conducts no further evaluation. *Id.*

Although animus is certainly sufficient to show a Free Exercise violation, it is not required. The Free Exercise Clause's protection extends "beyond those rare occasions on which the government explicitly targets religion ... for disfavored treatment."

Lukumi, 508 U.S. 577-78 (Blackmun, J., and O'Connor, J., concurring).[3] But the First Circuit ignored the unique historical concerns this Court relied upon in *Locke*, such as whether state aid was going for an essentially religious endeavor or whether the aid program included religion in its benefits to some degree, and permitted categorically excluding religion altogether.[4]

Colorado Supreme Court

In a recent opinion, the Colorado Supreme Court struck down, under the state constitution, a program that provided scholarships for students to attend private schools, including religious schools.[5] *See Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist.*, 351 P.3d 461, 475 (Colo. 2015). The plurality opinion in *Taxpayers for Public Education* held that the scholarship program violated Article IX, § 7, of the Colorado Constitution. A plurality of the court ruled that the state constitution required exclusion of religious schools from the aid program, and then

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[3] *See also Shrum v. City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (listing cases in which this Court and others foreclosed the application of laws enacted "not out of hostility or prejudice, but for secular reasons" on free exercise grounds).

[4] The First Circuit characterized the *Locke* opinion as confirming the "legitimacy of extra-constitutional Establishment Clause concerns." *Id.* at 355. Yet this Court never relied upon "extra-constitutional" concerns. The *Locke* Court characterized its decision as falling in the "play in the joints" between the Religion Clauses based on the unique historical concerns regarding the devotional training of clergy.

[5] Respondents in *Taxpayers for Public Education* have filed petitions for writs of certiorari seeking review by this Court.

justified this exclusion under *Locke*:

> By its terms, section 7 is far more restrictive than the Establishment Clause regarding governmental aid to religion, and the Supreme Court has recognized that state constitutions may draw a tighter net around the conferral of such aid. *See Locke v. Davey*, 540 U.S. 712, 721, 124 S.Ct. 1307, 158 L.Ed.2d 1 (2004) .

Taxpayers, 351 P.3d at 473-74. This is not "play in the joints" for state lawmakers, but the rejection of basic free exercise and equal protection principles in a case that involved no unique historically-based establishment concerns.

B. The Seventh and Tenth Circuits Hold that Locke Does Not Allow for the Exclusion of Religion from an Otherwise Neutral Aid Program.

In contrast to the First and Eighth Circuits, and the Colorado Supreme Court, the Tenth and Seventh Circuits hold that *Locke* did not leave states with unfettered discretion to exclude the religious from generally available secular benefits.

Tenth Circuit

The Tenth Circuit, in an opinion authored by Judge McConnell, held that *Locke* does not allow for the exclusion of students who attend "pervasively sectarian" colleges from a neutral scholarship program. *See Colo. Christian*, 534 F.3d at 1255. As

the Tenth Circuit explained:

> The opinion [in *Locke*] suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain "historic and substantial state interest[s]," and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support.

Id. (quoting *Locke*, 534 F.3d at 725).

Unlike the Eighth and First Circuits, and the Colorado Supreme Court, that applied *Locke* out of context, Judge McConnell's opinion in *Colorado Christian* is faithful to the unique historical concerns that underlay this Court's decision. The Tenth Circuit thus continues to faithfully apply the Free Exercise Clause to protect individuals and groups from the denial of entirely secular benefits based solely on their religious practice and beliefs.

Seventh Circuit

The Seventh Circuit agrees with the Tenth Circuit that *Locke* does not justify categorically excluding religious groups from generally available government aid programs. In *Badger Catholic, Inc. v. Washington*, 620 F.3d 775 (7th Cir. 2010), the Seventh Circuit, in an opinion by Chief Judge Easterbrook, struck down the University of Wisconsin's ban on student-led groups using student activity fee funds for religious activities. 620 F.3d at 777. The Seventh Circuit noted that the University,

in contrast to the state in *Locke*, did not do anything to include religion in the aid program and instead categorically excluded it. 620 F.3d at 780. Thus, the *Badger Catholic* Court adhered to this Court's admonition that *Locke* does not justify widespread exclusions of religious groups from government aid programs in which government grants are neutrally available to all.

In either the Seventh or Tenth Circuits, federal courts would hold that the DNR's exclusion of churches from the scrap tire program violates the Free Exercise Clause. But in the Eighth and First Circuits, federal courts would conclude that such religious discrimination is allowed, even though it sends a much stronger message of disfavor than the "mild" message sent in *Locke*. That conflict requires resolution by this Court.

Certainly, as this Court has explained, if government may bar "the extension of general benefits to religious groups, 'a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair.'" *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (quoting *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 747 (1976)). But "religious institutions need not be quarantined from public benefits that are neutrally available to all." *Roemer*, 426 U.S. at 746; *see also Committee for Pub. Educ. v. Regan*, 444 U.S. 646, 658, n.6 (1980) ("The Court never has held that religious activities must be discriminated against in this way."). This Court's review is warranted to resolve the conflict in the lower courts over the application of *Locke* to exclusions of religious groups from wholly secular

benefits like the rubber playground surface at issue in this case.

III. The Eighth Circuit's Ruling on Trinity's Claim under the Free Exercise Clause is Not Faithful to This Court's Decision in *Locke*.

The Eighth Circuit's opinion distorts *Locke* to justify the exclusion of religion from neutrally available public benefits even when there is no Establishment Clause violation or even a valid historical concern. None of the unique factors underlying this Court's decision in *Locke* are present here. Regardless, the Eighth Circuit rejected Trinity's free exercise claim. Its rationale allows the government to justify any exclusion of religious groups as "play in the joints" between the Religion Clauses. Such a gross deviation from free exercise precedent warrants this Court's review.

A. *Locke v. Davey*

In *Locke*, this Court held that the State of Washington did not violate the Free Exercise Clause when it denied scholarship funds solely to students pursuing a degree in devotional theology. 540 U.S. at 715. This Court held that the exclusion fell within the "play in the joints" between state actions "permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19. Several factors were key to the holding in *Locke*.

1. Funding for an essentially religious endeavor

First, this Court noted that Davey was seeking funding for an "essentially religious endeavor." *Id.* at 721. It could "think of few areas in which a state's antiestablishment interests come more into play." *Id.* at 722. This Court noted that "religious instruction is of a different ilk." *Id.* at 723. Importantly, the *Locke* Court cautioned that only the state's interest in not funding the devotional training of clergy was at issue and clarified that nothing in its opinion: "suggests that the [s]tate may justify any interest that its 'philosophical preference' commands." *Id.* at 722 n.5.

2. Fairly mild disfavor of religion

Second, this Court noted that the state's disfavor of religion in the scholarship program was fairly mild. *Id.* at 720-21. "It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. And it does not require students to choose between their religious beliefs and receiving a government benefit." *Id.* (internal marks and citations omitted).

3. Including religion in program

Third, this Court explained that the scholarship program at issue in *Locke* went "a long way toward including religion in its benefits." *Id.* at 724. Under the State of Washington's program, students could still attend pervasively religious schools and could

use their scholarship money to fund non-devotional theology classes. *Id.*

4. Lack of Blaine Amendment

The Court also noted that the Washington constitutional provision at issue was not a Blaine Amendment, nor had Davey "established a credible connection" to a state Blaine Amendment. *Id.* at 723. n.7. Accordingly, the Court did not consider the anti-Catholic bigotry that resulted in other states' constitutional provisions. *Id.*

Overall, given the relevant factors, this Court found no evidence of religious animus in the text, history, or operation of the scholarship program and thus, the program fell within the "play in the joints" between the Religion Clauses. *Id.* at 725.

B. The Eighth Circuit Did Not Faithfully Apply *Locke*.

None of the rationales underlying *Locke* apply to the Scrap Tire Program. Thus, the Eighth Circuit's decision to uphold the program against a free exercise challenge conflicts with this Court's controlling precedent, including *Widmar*, which rejected the State of Missouri's asserted interest "in achieving greater separation of church and [s]tate than is already ensured under the Establishment Clause of the Federal Constitution." 454 U.S. at 276. As the *Widmar* Court explained, that interest—the same concern the State of Missouri asserts here—"is limited by the Free Exercise Clause" and in this case by the Equal Protection Clause as well. *Id.*

1. *Funding for purely secular endeavor*

First, Trinity does not seek funding for an essentially religious endeavor where the state's antiestablishment concerns may be heightened. Trinity seeks a grant for a rubber pour-in-place playground surface where its children and those from the community play. Seeking to protect children from harm while they play tag and go down the slide is about as far from an "essentially religious endeavor" as one can get. As Judge Gruender explained in dissent:

> [S]choolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion. If giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be.

App. 29a.

The state cannot seriously argue that its desire to reduce the amount of used tires in landfills and illegal dump sites is an "essentially religious endeavor." Even the Eighth Circuit panel majority noted that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire Grant Program without violating the Establishment Clause." App. 9a. That should be the end of the matter.

2. *Categorical disfavor of religion*

Second, Missouri's disfavor of religion is not the mild sort this Court approved in *Locke*. The Scrap Tire Program categorically excludes all church applicants. If an applicant is a church, it cannot receive a scrap tire grant even if it meets all other criteria, as was the case with Trinity Lutheran. *See* App. 154a (noting that Trinity's application ranked fifth out of forty-four and DNR awarded fourteen scrap tire grants in 2012).

The only way Trinity could receive a scrap tire grant would be for it hand over control of The Learning Center to a secular group or non-church nonprofit. Contrary to the Washington scholarship program in *Locke*, here the DNR requires applicants to "choose between their religious beliefs and receiving a government benefit." 540 U.S. at 720-21. Trinity is in the untenable position of either choosing to follow its religious beliefs and foregoing a government benefit, or of jettisoning its status as a church simply to participate in the Scrap Tire Grant Program. The DNR's religious exclusion sends a message that some children are less worthy of protection simply because they play on a playground owned by a church. This is not a mild disapproval of religion.

3. *Categorical exclusion of religion from a neutral benefits program*

Third, unlike in *Locke*, the Scrap Tire Grant Program does nothing to include churches. Instead,

it categorically excludes them from any and all benefits of the program. This sends a message of animus to the faithful that this Court found absent in *Locke*.

The Eighth Circuit panel majority was concerned that there was no "break in the link" between scrap tire funding and churches. *See* App. 10a. In *Locke*, the "break in the link" was the independent private choice of the scholarship recipients. *See Locke*, 540 U.S. at 719. But this Court's precedent is not so simplistic as to invalidate all aid to churches solely because they are religious and without regard to how the aid operates practically.

Programs, such as the one in this case, that evenhandedly allocate secular aid to a broad class of recipients without regard to religion, generally do not violate the Establishment Clause. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 809-14 (2000) (plurality opinion) (upholding program providing aid to parochial schools and stating that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs"); *Agostini v. Felton*, 521 U.S. 203, 230-31, 234-35 (1997) (upholding program providing remedial instruction to disadvantaged children on a neutral basis even though program included government employees on the premises of sectarian schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (upholding program that made funds generally available to any disabled child even though some children used the funds in a religious school).

Indeed, this Court has held that singling out religious entities for exclusion is unconstitutional. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (requiring school to allow religious groups access to school facilities on equal terms with other groups); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840–43 (1995) (requiring equal access by religious group to student activity fee); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993) (requiring use of school facilities on neutral basis as to a religious group); *Widmar v. Vincent*, 454 U.S. 263, 273–75 (1981) (requiring religious group's equal access to open forum because it was generally available to all groups and any aid to religion was incidental).

This Court has never held that private choice in aid programs is the only way to "break the link" between government and religion. This Court has upheld neutral programs that benefit sectarian institutions where there is no private choice involved but where the aid had no religious content and furthering religious activities was either non-existent or *de minimis*. *See, e.g. Comm. for Pub. Educ. v. Regan*, 444 U.S. 646, 656–59 (1980) ("[T]here does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with state-furnished materials have no such effect."); *Roemer*, 426 U.S. at 736 (upholding direct grants to religious institutions

because of prohibition against using the grant for sectarian purposes); *Hunt v. McNair*, 413 U.S. 734, 736, 744-45 (1973) (upholding issuance of revenue bonds for benefit of religious college where there was a prohibition on use of funds for buildings or facilities used for religious purposes). That aid flows directly to a church or other sectarian institution is not alone determinative under this Court's precedent.

Under the Scrap Tire Grant Program, aid flows directly to the applicant, in this case a church, but it also flows to a variety of secular organizations. App. 102a. Importantly, the disbursement provided may *only* be used for materials and delivery costs and may not be used for any other purpose, such as site preparation or labor. App. 124a. There is therefore no possibility that state aid will be diverted to religious purposes.

Trinity cannot convert rubber protecting children from injury into the advancement of religious doctrines. All children playing on the playground are protected. And the aid is for recycled tires, which is a far cry from even the aid for instructional materials approved in *Mitchell*, or the provision of government-paid teachers to religious schools in *Agostini*. In short, there are simply no legitimate Establishment Clause concerns present that would justify reading *Locke* as authorizing the categorical disqualification of otherwise qualified churches from the receipt of a purely secular benefit.

4. Missouri Constitution Article I, § 7 is born of religious bigotry.

Article 1, § 7 of the Missouri Constitution, the provision the state relies upon here, was enacted in 1875—the same time as the federal Blaine Amendment was proposed and debated. *See* Mo. Const. Art 1, § 7, *available at* http://www.moga.mo.gov/MoStatutes/Consthtml/A010071.html (last visited Nov. 2, 2015). It thus shares the same grounding in "hostility to the Catholic Church and to Catholics in general" that this Court recognized in *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion).

In upholding the DNR's policy excluding Trinity Lutheran from the Scrap Tire Grant Program, the Eighth Circuit did not follow *Locke*. None of the factors this Court relied upon in *Locke* are present here. If allowed to stand, instead of preserving a "play in the joints," the Eighth Circuit's opinion will result in the Establishment Clause devouring the Free Exercise and Equal Protection Clauses. That is not what the *Locke* Court intended.

IV. The Eighth Circuit's Equal Protection Ruling Conflicts with this Court's Precedent.

The Equal Protection Clause requires that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In this case, DNR is willing to award grants to secular daycares (and religious daycares not operated by churches) but denied

Trinity's application solely because it "is a 'church.'" App. 152a-153a. But "the Religion Clauses ... and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

Because the free exercise of religion is a fundamental right, the state's decision to make Trinity's religious status "relevant to [its] standing in the political community," *id.*, is subject to strict scrutiny under the Equal Protection Clause, *see Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457 (1988) (noting that "'strict judicial scrutiny'" applies when a law "interferes with a 'fundamental right'"). Indeed, under this Court's precedent, religious classifications are inherently "suspect" and must serve a compelling government interest and be narrowly tailored to that end. *See Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

Here, DNR denied "equal treatment" to Trinity solely because it is a church. *Kiryas Joel*, 512 U.S. at 715 (O'Connor, concurring). That arbitrary decision to deny Trinity a scrap tire grant because a church—rather than a secular (or other form of religious) nonprofit—holds title to the Learning Center serves no rational purpose, let alone a compelling one. Funding safe rubber playground surfaces for children poses no threat whatsoever to the state's antiestablishment goals. The state's extreme policy of "no churches allowed" is simply

unfounded here.

"Freedom of [religion], and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among [providing safe playground surfaces to daycares] on such a wholesale and categorical basis." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 101 (1972). That is particularly true given that this Court generally treats religious classifications as "presumptively invidious." *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

The Eighth Circuit's decision upholding Trinity's exclusion from a wholly secular benefit enjoyed by all similarly situated daycares, based on the mistaken application of *Locke* and subsequent conclusion that Trinity did not present "a valid Free Exercise claim," warrants this Court's review. It not only contributes to an existing circuit conflict regarding equal protection analysis, but also misapplies *Locke* to a factually inapposite case.

Below, the Eighth Circuit panel majority compounded its error by rejecting Trinity Lutheran's equal protection claim based on its erroneous free exercise analysis. The Eighth Circuit cited *Locke* for the proposition that "in the absence of a valid Free Exercise claim, Trinity['s] Equal Protection Claim is governed by rational basis review" and held that "[t]he high wall of separation between church and state created by Article I, § 7" satisfies that standard. App. 12a; *see Locke*, 540 U.S. at 720 n.3 ("Because we hold ... that the program is not a violation of the Free Exercise Clause, however, we

apply rational-basis scrutiny to [Davey's] equal protection claims. For the reasons stated herein, the program passes such review.") (internal citations omitted).

The Eighth Circuit's decision adds to an existing circuit conflict between the First Circuit and the Tenth Circuit regarding equal protection analysis in cases that also involve free exercise claims.

First Circuit

In *Eulitt*, the First Circuit also cited *Locke* for the proposition that "if a challenged program comports with the Free Exercise Clause, that conclusion wraps up the religious discrimination analysis" and "rational basis scrutiny applies to any further equal protection inquiry." 386 F.3d at 354 (citing *Locke*, 540 U.S. at 720 n.3).

Tenth Circuit

But the Tenth Circuit in *Colorado Christian University* rejected this holding by explaining that "[v]iolations of the Equal Protection and Free Exercise Clauses are generally analyzed in terms of strict scrutiny" and concluding that "statutes involving discrimination on the basis of religion ... are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." 534 F.3d at 1266 (citing *Locke*, 540 U.S. at 720 n.3, among other cases).

The Tenth Circuit's equal protection holding was grounded on its adherence to the plain language of

Locke and refusal to misread this Court's decision as subjecting "all 'state decisions about funding religious education to no more than rational basis review.'" *Id.* at 1254-55 (quoting Appellee's Br. 33).

In stark contrast, the Eighth and First Circuits applied *Locke* out of context to situations that bear no resemblance to "the clergy training involved in *Locke*" or that implicate any similar historical establishment concern. *Id.* at 1254; *see supra* Part III (outlining the unique historical bases for *Locke's* free exercise and equal protection holdings).

As a result, in the Tenth Circuit, federal courts would hold that the DNR's exclusion of churches from the scrap tire program triggers strict scrutiny and violates the Equal Protection Clause. But in the Eighth and First Circuits, federal courts would conclude that such religious discrimination is subject to rational basis review and that it readily hurdles that standard. This conflict regarding *Locke's* application to equal protection analysis in the free exercise realm can only be resolved by this Court.

V. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented, an important and longstanding question of federal law. The facts are straightforward and are not open to dispute. And because this case was decided on a motion to dismiss, the facts alleged in the Complaint must be taken as true. Accordingly, the question presented can be decided as a matter of law.

Moreover, the grant program at issue makes this case a particularly clean vehicle. The Scrap Tire Program is completely secular and free of any nuances that could detract from deciding the issues presented in this appeal. Specifically, the state's program provides purely secular aid in the form of grants that can be used only for the purchase and delivery of scrap tire material and cannot be used for any other purpose. No aid provided through the program could arguably be labeled religious, thus allowing this Court to confront directly the issue of whether Trinity can be excluded from participating in a purely secular and neutral aid program solely because it is a church.

The parties are also particularly well suited for resolution of the question presented. Petitioner is a church that operates a daycare that was previously operated under the auspices of a separate nonprofit organization. Thus, the issue of participation by a church in a purely secular grant program is presented cleanly for resolution.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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November 4, 2015

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 14-1382

Trinity Lutheran Church of Columbia, Inc.

Plaintiff – Appellant

v.

Sara Parker Pauley, in her official capacity

Defendant - Appellee

The Becket Fund for Religious Liberty

Amicus on Behalf of Appellant(s)

American Civil Liberties Union Foundation, et al.

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the Western District of Missouri – Jefferson City

Submitted: January 15, 2015
Filed: May 29, 2015

Before LOKEN, MELLOY, and GRUENDER, Circuit Judges.

LOKEN, Circuit Judge.

Trinity Lutheran Church of Columbia, Inc. ("Trinity Church"), filed this action alleging that Sara Pauley, acting in her official capacity as Director of the Missouri Department of Natural Resources ("DNR"), violated Trinity Church's rights under the United States and Missouri Constitutions by denying its application for a grant of solid waste management funds to resurface a playground on church property. The district court[1] dismissed the Complaint for failure to state a claim and denied Trinity Church's post-dismissal motion for leave to file an amended complaint. Trinity Church appeals both rulings. We affirm.

I. Background

Trinity Church operates on its church premises a licensed preschool and daycare called the Learning Center. Initially established as a non-profit corporation, the Learning Center merged into Trinity Church in 1985. The Learning Center has an open admissions policy. It is a ministry of Trinity Church that teaches a Christian world view and incorporates daily religious instruction in its programs.

DNR offers Playground Scrap Tire Surface Material Grants, a solid waste Management program. The grants provide DRN funds to qualifying organizations for the purchase of recycled

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[1] The Honorable Nanette K. Laughrey, United States District Judge for the Western District of Missouri.

tires to resurface playgrounds, a beneficial reuse of this solid waste. See Mo. Rev. Stat. §§ 260.335.1, 260.273.6(2). In 2012, Trinity Church applied for a grant to replace the Learning Center's playground surface, disclosing that the Learning Center was part of Trinity Church. On May 21, 2012, the Solid Waste Management Program Director wrote the Learning Center's Director, advising:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, section or denomination of religion."

A Solid Waste Management Program planner subsequently advised the Solid Waste Management District Director that Trinity Church's application ranked fifth out of forty four applications in 2012, and that fourteen projects were funded.

Trinity Church commenced this action, asserting federal question jurisdiction over claims that the denial of its Scrap Tire application violated (i) the Equal Protection Clause of the Fourteenth Amendment, (ii) its First Amendment right to free exercise of religion, (iii) the First Amendment's Establishment Clause, and (iv) its First Amendment right of free speech. The Complaint invoked the district court's supplemental jurisdiction over a fifth

cause of action, alleging that DNR's denial violated Article I, Section 7, of the Missouri Constitution. Trinity Church sought injunctive and declaratory relief against DNR "policies and actions in denying grants to applicants who are churches or connected to churches."

The district court granted Director Pauley's motion to dismiss the complaint for failure to state a claim. Trinity timely moved for reconsideration and for leave to amend its complaint to add a factual allegation that the DNR had previously given grants under the Scrap Tire Program to at least fifteen other religious organizations, including churches. The district court denied the motion to reconsider. It also denied leave to amend because Trinity Church "fail[ed] to provide any explanation for not amending its Complaint prior to the dismissal of this action." The court further noted that the amendment was "futile" because, while Trinity Church argued the newly alleged fact "undermines Missouri's purported interest" in denying the application, Trinity Church "failed to identify any valid legal theory under which Missouri would need to show the existence of a compelling interest."

Trinity Church appeals every aspect of the district court's rulings, except the dismissal of its First Amendment free speech claim. We review the dismissal of a complaint for failure to state a claim *de novo*. Dunbar v. Wells Fargo Bank, N.A., 709 F.3d 1254, 1256 (8th Cir. 2013). We review the denial of leave to amend for abuse of discretion, but we review *de novo* legal conclusions underlying a determination

of futility. In re Medtronic, Inc., Sprint Fidelis Leads Prods. Liab. Litig., 623 F.3d 1200, 1208 (8th Cir. 2010).

II. The Federal Constitutional Claims

"Missouri has a long history of maintaining a very high wall between church and state." Luetkemeyer v. Kaufmann, 364 F. Supp. 376, 383-84 (W.D. Mo. 1973), aff'd, 419 U.S. 888 (1974). Two provisions in the Missouri Constitution "declaring that there shall be a separation of church and state are not only more explicit but more restrictive than the Establishment Clause of the United States Constitution." Paster v. Tussey, 512 S.W.2d 97, 101-02 (Mo. banc 1974), cert. denied, 419 U.S. 1111 (1975). Those provisions, one of which is at the core of this dispute, were initially adopted in 1870 and 1875. As re-adopted in the Missouri Constitution of 1945, they now provide:

> **Art. I, § 7.** That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.

> **Art. IX, § 8.** Neither the general assembly, nor any county, city, town [etc.] shall ever

> make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school ...or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation... ever be made by the state ... for any religious creed, church, or sectarian purpose whatever.[2]

Trinity Church's Complaint alleged that, by denying its grant application solely because it is a church, DNR (i) violated the Free Exercise clause because it "target[ed] religion for disparate treatment" without a compelling government interest; (ii) violated the Establishment Clause because the denial "was hostile to religion" and required DNR "to determine what is religious enough" to justify denial; and (iii) violated the Equal Protection Clause by discriminating against religious learning centers and day care organizations without a compelling government interest. Although Trinity Church couched these claims as an attack on DNR's "customs, policies and practices," all its claims are plainly facial attacks on Article I, § 7, of the Missouri Constitution, which provides that "no money shall ever be taken from the public treasury,

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[2] These two Sections are construed together to make up Missouri's Establishment Clause. See St. Louis Univ. v. Masonic Temple Ass'n of St. Louis, 220 S.W.3d 721, 725 (Mo. banc 2007).

directly or indirectly, in aid of any church," and which was cited by DNR as the sole basis for its denial.

Viewed in this light, it is apparent that Trinity Church seeks an unprecedented ruling -- that a state constitution violates the First Amendment and the Equal Protection Clause if it bars the grant of public funds to a church. To prevail, Trinity Church must clear a formidable if not insurmountable hurdle, what appears to be controlling adverse precedent. In Luetkemeyer, a three-judge district court was convened in the Western District of Missouri to consider a claim that the First Amendment and the Equal Protection clause required Missouri to provide the same public transportation benefits for the pupils of church-related schools as were being provided to transport children to public schools. 364 F. Supp. at 377. In denying plaintiffs injunctive and damage relief, the majority explained:

> We conclude without hesitation that the long established constitutional policy of the State of Missouri, which insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment, is indeed a 'compelling state interest in the regulation of a subject within the State's constitutional power' . . . That interest, in our judgment, satisfies any possible infringement of the Free Exercise clause of the First Amendment or of any other prohibition in the Constitution of the United States.

* * * * *

> The fact that Missouri has determined to enforce a more strict policy of church and state separation than that required by the First Amendment does not present any substantial federal constitutional question.

Id. at 386 (quotation and citations omitted). Plaintiffs appealed to the Supreme Court of the United States. The Court summarily affirmed. Two Justices dissented, arguing the Court should have noted probable jurisdiction and set the case for argument on two questions, whether the different treatment of public-school and parochial-school children violated equal protection principles, and whether the arbitrary denial of a general public service made the State an "adversary" of religion. 419 U.S. at 890 (White, J., dissenting).

When the Supreme Court summarily affirms a lower federal court, its decision "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided," but the Court has affirmed only the judgment, not necessarily the rationale of the lower court. Mandel v. Bradley, 432 U.S. 173, 176 (1977). Here, while the parameters of the Supreme Court's summary affirmance in Luetkemeyer may not be free from doubt, given the issues addressed in the dissent from summary affirmance, we conclude that the Court necessarily decided that Article I, § 7, of the Missouri Constitution is *not* facially invalid. That conclusion is supported by the Court's prior

summary affirmance in Brusca v. State of Mo. ex rel. State Bd. of Educ., 332 F. Supp. 275, 279-80 (E.D. Mo. 1971) (concluding that Article IX, § 8, and Missouri statutes denying public funds to sectarian schools for religious instruction do not violate the Free Exercise or the Equal Protection clauses), aff'd, 405 U.S. 1050 (1972); see also Wheeler v. Barrera, 417 U.S. 402, 412 n.9, 421- 22, 426 (1974).

Trinity Church requests injunctive relief compelling Missouri to provide grants directly to churches, funding that is prohibited by a provision of the Missouri Constitution that has been a bedrock principle of state law for nearly 150 years. Without question, a state constitutional provision is invalid if it conflicts with either religion clause of the First Amendment, or with the Fourteenth Amendment's Equal Protection Clause. We also recognize that the Supreme Court's Establishment Clause jurisprudence has evolved rather dramatically in the forty years since Luetkemeyer was decided. For example, it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire grant program without violating the Establishment Clause. But the issue here is not what the State is constitutionally permitted to do, but whether the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause *compel* Missouri to provide public grant money directly to a church, contravening a long-standing state constitutional provision that is not unique to Missouri.

No Supreme Court case, before or after Luetkemeyer, has granted such relief. Indeed, in Locke v. Davey, 540 U.S. 712 (2004), the Court upheld State of Washington statutes and constitutional provisions that barred public scholarship aid to post-secondary students pursuing a degree in theology. The Court noted the "popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion." Id. at 722. In Locke, "the link between government funds and religious training [was] broken by the independent and private choice of [scholarship] recipients," id. at 719, prompting the Court to examine carefully the "relatively minor burden" the scholarship exclusion placed on students taking devotional theology courses, id. at 725. By contrast, in this case there is no break in the link. Trinity Church seeks to compel the direct grant of public funds to churches, another of the "hallmarks of an 'established' religion." Therefore, while there is active academic and judicial debate about the breadth of the decision, we conclude that Locke reinforces our decision that Luetkemeyer is controlling precedent foreclosing Trinity Church's facial attack on Article I, § 7, of the Missouri Constitution.

Justice Scalia, dissenting for himself and Justice Thomas in Locke, articulated a contrary view of the First Amendment's religion clauses:

> When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens

> on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

Id. at 726-27. If the Court were to adopt this view, and if Justice Scalia's reference to withholding benefits to "individuals" were held to include direct public benefits to churches, then Article I, § 7, of the Missouri Constitution could not be validly applied to deny church participation in a host of publicly-funded programs. That may be a logical constitutional leap in the direction the Court recently seems to be going, but it is a leap of great magnitude from the Court's decisions in Luetkemeyer and in Locke. In our view, only the Supreme Court can make that leap. As the Court has often reminded us, a court of appeals "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini v. Felton, 521 U.S. 203, 237 (1997) (an Establishment Clause decision). We therefore follow Luetkemeyer and the many Supreme Court of Missouri decisions concluding that Article I, § 7, of the Missouri Constitution does not conflict with the First Amendment or the Equal Protection Clause of the United States Constitution.

For these reasons, we conclude that the district court correctly dismissed Trinity Church's federal

constitutional claims for failure to state a claim upon which relief could be granted.[3]

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[3]Even if Luetkemeyer were not controlling, we see little merit to Trinity Church's constitutional arguments, based on existing precedent. The Supreme Court in Locke expressly recognized that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." 540 U.S. at 719. Until the Court rules otherwise, the direct expenditure of public funds to aid a church is a paradigm example of that type of state action. "There is *no* relevant precedent for using [the Establishment Clause's] negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies." Strout v. Albanese, 178 F.3d 57, 64 (1st Cir.), cert. denied, 528 U.S. 931 (1999); see Bronx Household of Faith v. Bd. of Educ. of City of N.Y., 750 F.3d 184, 198 (2d Cir. 2014), cert. denied, --- S. Ct. ---, 2015 WL 1400936 (2015); Eulitt ex rel. Eulitt v. Maine, Dept. of Educ., 386 F.3d 344, 355 (1st Cir. 2004). DNR's decision to deny the grant application because Trinity Church is a "church" within the meaning of Article I, § 7, of the Missouri Constitution hardly required an excessive entanglement with religion, unlike the state statute at issue in Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1250-51 (10th Cir. 2008) (requiring consideration of factors to determine whether a scholarship applicant was ineligible because the institution of higher education was "pervasively sectarian").

As the district court recognized, in the absence of a valid Free Exercise claim, Trinity Church's Equal Protection Claim is governed by rational basis review. Locke, 540 U.S. at 720 n.3. The high wall of separation between church and state created by Article I, § 7, is a historic and substantial State interest that DNR was obligated to obey in administering the Spare Tire grant program. This interest clearly satisfies rational basis review. See Luetkemeyer, 364 F. Supp. at 383-84 and cases cited.

III. The Missouri Constitutional Claim

Trinity Church's fifth cause of action alleged that the DNR's grant denial violated the second clause of Article I, § 7, which forbids "any discrimination made against any church," and that granting the application would not have violated the first clause because it would not have been "in aid any church." Though pleaded last, this was the only claim argued at length by Trinity Church at the hearing on defendant's motion to dismiss, and it was the lead argument in its brief on appeal (seemingly an implicit acknowledgment the federal constitutional claims are weak). This inversion of the theories pleaded distracted the district court from a very serious issue -- after dismissing the federal claims, should the court have declined to exercise its supplemental jurisdiction over a state law claim that is based on an important provision of the Missouri Constitution and turns on the proper interpretation of rather ambiguous Supreme Court of Missouri precedents? We think that question should have been answered affirmatively, but we will nonetheless review the district court's dismissal of this claim on the merits.

Under Missouri law, the district court had jurisdiction to decide the state law claim pleaded in the initial Complaint because whether Article I, § 7, permits DNR to deny Scrap Tire Program grants to all church applicants is an issue of law. See Premium Std. Farm, Inc. v. Lincoln Twp., 946 S.W.2d 234, 237-38 (Mo. banc 1997) (exhaustion of administrative remedies is a jurisdictional issue);

Motor Control Specialties, Inc. v. Petelik, 258 S.W.3d 482, 485-86 (Mo. App. 2008). Turning to the merits, we agree with the district court that the two clauses of Article I, § 7, must be interpreted in harmony. See Union Elec. Co. v. Dir. of Revenue, 425 S.W.3d 118, 122 (Mo. banc 2014); Wring v. City of Jefferson, 413 S.W.2d 292, 300 (Mo. Banc 1967). Therefore, if granting Trinity Church's application would have constituted "aid" to a church prohibited by the first clause of Article I, § 7, then denying the grant was not a discriminatory action prohibited by the second clause. So the district court properly focused on Trinity Church's contention that a Scrap Tire Program grant is not "aid" within the meaning of the first clause of Article I, § 7, because it involves a quid pro quo, with the applicant undertaking obligations under the Scrap Tire Program in exchange for the granted funds. On appeal, Trinity Church argues the court erred in rejecting this interpretation of state law.

Trinity Church bases its contention on the reasoning in two Supreme Court of Missouri decisions, Kintzele v. City of St. Louis, 347 S.W.2d 695 (Mo. banc 1961), which Trinity Church did not cite to the district court, and Americans United v. Rogers, 538 S.W.2d 711 (Mo. banc), cert. denied, 429 U.S. 1029 (1976), which the district court described as "grossly misrepresented" by Trinity Church. Concluding that the quid pro quo exception to Article I, § 7's, prohibition was not supported by any Missouri case, the court instead relied on the many Supreme Court of Missouri decisions that "strictly interpreted [Article I] Section 7 to prohibit public

funding of religious institutions" in order to maintain "the higher wall of separation between church and state present in the Missouri Constitution." See Paster, 512 S.W.2d at 104-105 (invalidating statute requiring public school boards to provide textbooks to private school students); Bereghorn v. Reorg. Sch. Dist. No. 8, 260 S.W.2d 573, 582-83 (Mo. 1953); McVey v. Hawkins, 258 S.W.2d 927, 933-34 (Mo. 1953) (enjoining use of public school buses to transport students to religious schools); Harfst v. Hoegen, 163 S.W.2d 609, 613-14 (Mo. 1941) (enjoining use of public school funds for the teaching of religion and faith at a parochial school that was taken into the public school system); accord Luetkemeyer, 364 F. Supp. at 383- 84 (upholding the State's refusal to provide transportation to church-sponsored schools); Brusca, 332 F. Supp. at 279-80 (the State may deny funds to sectarian schools for religious instruction).

Based on these decisions, the district court concluded that Trinity Church's state law claim under the Missouri Constitution must be dismissed because its "own pleadings demonstrate that funds from [DNR] in the form of the Scrap Tire Program would aid the Church and its Ministry Learning Center within the meaning of Missouri law." We agree with this assessment of how the Supreme Court of Missouri would decide this claim. In Kintzele, plaintiffs alleged that a subsidized sale of land by the State to St. Louis University constituted an unconstitutional use of public funds in aid of a private sectarian school. The Court declined to invalidate the sale, concluding that, because

Missouri law authorized "sale by negotiation at fair value," and the State tried competitive bidding and thereafter sold the land to SLU at nearly twice the highest bid, "plaintiffs' contention of illegal . . . subsidy from public funds cannot be sustained." 347 S.W.2d at 700-701. This decision in no way supports Trinity Church's claim that a Scrap Tire Program grant is not "aid."

In Americans United, the Supreme Court of Missouri upheld a statute providing tuition grants to students at approved public and private colleges. The statute was invalidated by the trial court, applying Article I, § 7, and Article IX, § 8. The State appealed. Noting that "[a]n act of the legislature is presumed to be valid and will not be declared unconstitutional unless it clearly and undoubtedly contravenes some constitutional provision," 538 S.W.2d at 716, the Court concluded it could not "with confidence declare that the statutory program" clearly contravened these constitutional provisions because "the parochial school cases with which the court has dealt in the past involved completely different types of educational entities than the colleges and universities herein involved." Id at 721-22. The defendants' quid pro quo argument was noted but not adopted. Id. at 721.

Americans United demonstrates that Article I, § 7, will be difficult to apply in some cases, particularly when an expenditure authorized by state statute is challenged as beyond the State's constitutional authority. But that decision does not support Trinity Church's claim to affirmative relief

in this case. In upholding the challenged program, the Court reaffirmed that the Missouri Constitution is "more restrictive than the First Amendment to the United States Constitution in prohibiting the expenditures of public funds in a manner tending to erode the absolute separation of church and state," and it noted that the program was "designed and implemented for the benefits of the students, not of the institutions, and that the awards are made to the students, not to the institutions. The legislative purpose in no wise includes supporting aiding or sustaining either public or private educational institutions." Id. at 720.

We affirm the district court's dismissal of the state law claim under the Missouri Constitution in Trinity Church's original Complaint.

IV. The Motion to Amend

Following the district court's dismissal order, Trinity Church filed a motion to reconsider that included a motion for leave to amend its Complaint. The proposed Amended Complaint added a fact paragraph alleging that the DNR had previously awarded Scrap Tire Program grants to at least fifteen other religious organizations. It also added a paragraph to the Equal Protection Clause cause of action alleging that DNR "has allowed other similarly-situated religious organizations to participate in the Scrap Tire Program." All other allegations in the ninety-seven-paragraph Complaint were unchanged. Trinity Church attached as an exhibit a document dated October 19, 2010, that

listed "Prior Recipients of Scrap Tire Surface Material Grants." The district court denied the motion because Trinity Church failed to provide any explanation for failing to amend prior to dismissal of its action.

"Post-dismissal motions to amend are disfavored." Medtronic, 623 F.3d at 1208. While a post-dismissal motion may be granted if timely requested, "interests of finality dictate that leave to amend should be less freely available after a final order has been entered." U.S. ex rel. Roop v. Hypoguard USA, Inc., 559 F.3d 818, 823 (8th Cir. 2009). Numerous cases have ruled that unexcused delay is sufficient to justify denial of post-dismissal leave to amend. United States v. Mask of Ka-Nefer-Nefer, 752 F.3d 737, 743-44 (8th Cir. 2014), and cases cited.

On appeal, Trinity Church for the most part ignores this well-established law, simply distinguishing the cases cited by the district court because Trinity Church was not "given any warning that it needed to amend its pleadings." The briefs on appeal assert that Trinity Church learned in discovery that other religious entities had received grants, but counsel admitted at oral argument that Trinity Church obtained the October 2010 listing attached to the proposed Amended Complaint from the DNR website, where it was doubtless available when Trinity Church filed its Complaint in January 2013. Thus, the district court did not abuse its discretion in concluding that Trinity Church failed to

provide a valid reason for its failure to amend prior to dismissal.

The district court's alternative futility ruling is more problematic and warrants *de novo* consideration. The proposed amended pleading did not alter the allegations in the First Amendment causes of action based on the Free Exercise Clause and the Establishment Clause; it only alleged a different type of discrimination violating the Equal Protection Clause, discrimination between "similarly situated religious organizations." Thus, when Trinity Church argued to the district court that its newly discovered evidence supported the claim that DNR's grant application denial "lacks a compelling interest," the district court was right to observe that this added nothing to the original claims because, in the absence of a valid Free Exercise or Establishment Clause claim, the Equal Protection Clause claim was subject to rational basis review and no compelling interest need be shown.

There is a problem lurking here, one that was camouflaged by Trinity Church's primary contention that Article I, § 7, violates the federal and state constitutions by mandating that churches be excluded from the Scrap Tire Program. The problem is that these constitutional claims take on an entirely new complexion if DNR is awarding Scrap Tire grants to some churches, but not to others. If intentional, that would be a clear violation of the First Amendment, and no doubt of the Missouri Constitution as well. See, e.g., Larson v. Valente, 456 U.S. 228, 246 (1982) ("No State can pass laws

which aid one religion or that prefer one religion over another"); Waites v. Waites, 567 S.W.2d 326, 333 (Mo. banc 1978) ("Any suggestion that a state judicial officer [was] favoring or tending to favor one religious persuasion over another . . . would be intolerable to our organic law"). If the proposed Amended Complaint plausibly pleaded this dramatically new theory, did the district court abuse its discretion in failing to grant leave to amend, even if Trinity Church failed to clearly articulate the theory? We conclude not, for two distinct but related reasons.

First, "a district court does not abuse its discretion in refusing to allow amendment of pleadings to change the theory of a case if the amendment is offered after summary judgment has been granted against the party, and no valid reason is shown for the failure to present the new theory at an earlier time." Littlefield v. City of Afton, 785 F.2d 596, 610 (8th Cir. 1986) (quotation omitted). In Littlefield, we affirmed the denial of leave to amend a dismissed § 1983 due process action to assert a new equal protection claim. Id. at 609. That is directly analogous to the situation here. The facts were at hand to assert this narrower theory in the initial Complaint, but Trinity Church chose not to do so. "The district court did not abuse its discretion in concluding [this] tactical choice did not demonstrate diligence or good cause." Morrison Ents., L.L.C. v. Dravo Corp., 638 F.3d 594, 611 (8th Cir.), cert. denied, 132 S. Ct. 244 (2011).

Second, the new theory we have identified would significantly alter the lawsuit's procedural landscape. Under the new theory, both the federal and state constitutional claims would turn on the fact bases for DNR's allegedly discriminatory treatment of similarly situated religious organizations, not on a Constitution-driven "policy" of not making any grants to churches. For the federal claims, this raises a serious question of what is called Pullman abstention[4] -- "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984); see Beavers v. Ark. State Bd. of Dental Exam'rs, 151 F.3d 838, 840-41 (8th Cir. 1998). Here, a state court would be in the best position to decide the "difficult and unsettled" question of how Article I, § 7, and other provisions of the Missouri Constitution and statutes apply to DNR's fact-based decisions whether to award Scrap Tire Program grants to particular church-related applicants. And state court resolution of that question would likely moot or resolve, and most certainly would affect, a federal court's resolution of the substantial, largely overlapping First Amendment and Equal Protection Clause issues.

For the state law claim, the new theory appears to raise serious jurisdiction and venue issues under the Missouri Administrative Procedure Act, Mo. Rev.

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[4] Derived from Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

Stat. §§ 536.010 et seq. See Motor Control Specialties, 258 S.W.3d at 485-87. These issues would best be resolved by a state court, further supporting Pullman abstention. In these circumstances, even if the proposed Amended Complaint pleaded a new theory of relief that was not entirely futile, the district court did not abuse its discretion in denying an untimely request to fundamentally alter the litigation.

The judgment of the district court is affirmed.

GRUENDER, Circuit Judge, concurring in part and dissenting in part.

Trinity Lutheran Church ("Trinity Lutheran") applied for a grant through the Learning Center, a daycare and preschool that Trinity Lutheran runs. This grant would allow the Learning Center to make its playground safer by swapping the gravel that covers it for a rubber surface made from recycled tires. The Missouri Department of Natural Resources ("the Department"), which administers this grant program, accepted Trinity Lutheran's application and ranked it fifth out of the forty-four applications from that year. The Department approved fourteen grant applications, but Trinity Lutheran's was not among them. Relying solely on the Missouri Constitution's prohibition on using public funds to aid a church, Mo. Const. Art. I, § 7, the Department denied Trinity Lutheran's grant application. Thus, but for the fact that the Learning Center was run by a church, it would have received a playground-surfacing grant. Where, as here,

generally available funds are withheld solely on the basis of religion, the Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), governs claims brought under the Free Exercise Clause of the First Amendment. Applying the careful balance struck by *Locke*, I would conclude that Trinity Lutheran has sufficiently pled a violation of the Free Exercise Clause as well as a derivative claim under the Equal Protection Clause.

The court attempts to impose a barrier to full consideration of *Locke*. Trinity Lutheran, the court concludes, challenges the facial validity of Article I, § 7 of the Missouri Constitution by requesting a ruling that "a state constitution violates the First Amendment and the Equal Protection Clause if it bars the grant of public funds to a church." *Ante* at 5. By framing Trinity Lutheran's claim this broadly, the court avoids fully grappling with *Locke* by merely pointing to an instance in which this state constitutional provision has been upheld. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (requiring a plaintiff raising a facial attack to show "no set of circumstances" under which a provision would be valid). The court concludes that the Supreme Court's summary affirmance in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), a case that concerned the separate issue of busing, *id.* at 377, is one such application.[5]

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[5] The Department did not cite *Luetkemeyer* in its appeal brief. By the court's reasoning, the Department's failure to raise this argument (much less order it first in its brief) serves as "seemingly an implicit

But Trinity Lutheran does not mount the expansive facial challenge that the court attributes to it. Trinity Lutheran tries to bring an as-applied challenge; the complaint says so numerous times. However, determining whether a constitutional challenge is purely as-applied, purely facial, or somewhere in between turns on whether the plaintiff's "claim and the relief that would follow ... reach beyond the particular circumstances of the[ ] plaintiff[ ]." *Doe v. Reed*, 561 U.S. 186, 194 (2010). If they do, the claim is facial but only "to the extent of that reach." *Id.* When analyzing a claim and the relief that would follow, a court should "construe a plaintiff's challenge, if possible, to be as-applied." *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 864 (11th Cir. 2013), *cert. denied*, 572 U.S. ---, 134 S. Ct. 1877 (2014). Trinity Lutheran, as the court acknowledges, frames its challenge as an attack on the Department's "customs, policies, and practices." And Trinity Lutheran specifically requests a declaration that the Department's denial of its grant application was unconstitutional. Trinity Lutheran also specifically requests injunctive relief prohibiting the Department from discriminating against it in future grant applications. *Id.* at 862 ("We look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature."). This claim and relief only implicate Trinity Lutheran. *See Doe*, 561 U.S. at 194. Consequently, Trinity Lutheran does not contend that Article I, § 7 of the

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acknowledgement" that this argument is "weak." *Ante* at 10.

Missouri Constitution is unconstitutional in all of its applications.

This brings me to *Locke*. In the face of a Free Exercise challenge, the Court upheld a college scholarship program that prevented students from using the scholarship to pursue a degree in devotional theology, a course of study that the court characterized as "akin to a religious calling as well as an academic pursuit." 540 U.S. at 715, 721, 725. The Court began with the proposition that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 719. Because the "State's disfavor of religion (if it can be called that)" in prohibiting recipients from using the scholarship to major in devotional theology "is of a far milder kind," the Court concluded that the scholarship program was not presumptively unconstitutional. *Id.* at 720. In upholding the program, the Court found that it "goes a long way toward including religion in its benefits"— for example, by allowing recipients to attend pervasively religious schools that are accredited and to take devotional-theology courses. *Id.* at 724-25. To the Court, this "relatively minor burden" was justified by a "historic and substantial state interest" of not funding "an essentially religious endeavor." *Id.* at 721, 725. This interest, the Court explained, was rooted in our nation's history of "popular uprisings against procuring taxpayer funds to support church leaders" as well as the founding-era decisions of many states to "place[ ] in their constitutions formal prohibitions against using tax funds to support the ministry." *Id.* at 721-

23. Considering this "historic and substantial state interest" alongside the "relatively minor burden," the Court found no violation of the Free Exercise Clause. *Id.* at 725.

Locke did not leave states with unfettered discretion to exclude the religious from generally available public benefits. To the contrary, Chief Justice Rehnquist's opinion for seven members of the Court was careful to acknowledge its parameters. *See id.* at 719, 725 (stating that "some" actions are permitted by the Establishment Clause but not required by the Free Exercise Clause and explaining that "[i]f any room exists between the two Religion Clauses, it must be here"). "The [*Locke*] opinion thus suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s],' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008) (McConnell, J.) (alteration in original) (citation omitted) (quoting *Locke*, 540 U.S. at 725). *Locke* "suggests the need for balancing interests: its holding that 'minor burden[s]' and 'milder' forms of 'disfavor' are tolerable in service of 'historic and substantial state interest[s]' implies that major burdens and categorical exclusions from public benefits might not be permitted in service of lesser or less long-established governmental ends." *Id.* at 1255-56 (alterations in original) (quoting *Locke*, 540 U.S. at 720, 725). Simply put, the *Locke* Court

"indicated that the State's latitude with respect to funding decisions has limits." *Id.* at 1255.

Applying the balancing of interests contemplated by *Locke*, I conclude that Trinity Lutheran has sufficiently pled a Free Exercise violation. The disfavor of religion here is more pronounced than in *Locke*. The student in *Locke* could use his scholarship to attend a pervasively religious school that was accredited and to take courses in devotional theology there. And a pervasively religious school that received scholarship money even could require its students to take devotional-theology classes. 540 U.S. at 724-25. The program, as the Court put it, went "a long way toward including religion in its benefits." *Id.* at 724. The same cannot be said here. Trinity Lutheran has pled that the Department categorically prohibited the Learning Center from receiving a playground-surfacing grant because it is run by a church. This blanket prohibition is different in kind from the disfavor of religion that was present in *Locke*. Whereas the *Locke* program excluded religious study while also including it, *id.* at 724-25, the Department has entirely excluded the Learning Center from receiving a playground- surfacing grant. Much like the Tenth Circuit, I read *Locke* to impose some bounds on such a "wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian*, 534 F.3d at 1255.

The Department's reason for singling out the Learning Center differs from the historic and

substantial state interest in *Locke*, where the state sought to avoid paying for the training of clergy, "an essentially religious endeavor." 540 U.S. at 721-23. The sheer religiosity of this activity led the court to remark that "we can think of few areas in which a State's antiestablishment interests come more into play." *Id.* at 722. It is true that the Department's interest in enforcing Article I, § 7 of the Missouri Constitution is historic in the sense that this provision is longstanding. But the state's interest in *Locke* traced to concerns that were specific to paying for training the clergy. *Id.* at 722-23. The Court was unequivocal about this point: "[T]he only interest at issue here is the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5. Here, by contrast, the Department seeks to enforce a general prohibition on aid to a church that is in no way specific to the playground-surfacing grant program. This case therefore lacks the correspondence between the past and the Department's present interest that the Court found significant in *Locke*. *Cf. id.* ("Nothing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands."); *McDaniel v. Paty*, 435 U.S. 618, 628-29 (1978) (plurality opinion) (explaining that "the American experience provides no persuasive support" for an antiestablishment concern even though several states had constitutional provisions on the topic); *Bronx Household of Faith v. Bd. of Educ. of N.Y.*, 750 F.3d 184, 195 (2d Cir. 2014) ("We do not mean to imply that merely by claiming the motivation of observing interests favored by the Establishment Clause a governmental entity gets a free pass, avoiding *all*

scrutiny."), *cert. denied*, 575 U.S. ---, 135 S. Ct. 1730 (2015).

Perhaps more importantly, the substantial antiestablishment interest identified in *Locke* is not present here. Unlike a student preparing for the ministry, which is "an essentially religious endeavor," 540 U.S. at 721, schoolchildren playing on a safer rubber surface made from environmentally-friendly recycled tires has nothing to do with religion. If giving the Learning Center a playground-surfacing grant raises a *substantial* antiestablishment concern, the same can be said for virtually all government aid to the Learning Center, no matter how far removed from religion that aid may be. When the *Locke* Court spoke of a substantial antiestablishment concern, I seriously doubt it was contemplating a state's interest in not rubberizing a playground surface with recycled tires. See *Bronx Household of Faith*, 750 F.3d at 194 ("Underlying the Board's prohibition [of hosting religious services in school facilities] is a slightly different manifestation of the same historical and constitutional aversion to the use of public funds to support the practice of religion cited by the Court in *Locke*.").

In light of the Department's negligible antiestablishment interest, I conclude that the court overstates the significance of the Department's concern about giving a grant directly to the Learning Center, rather than having the money filtered through the independent choice of private individuals. "Although private choice is one way to break the link between government and religion, it is

not the only way." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 295 (6th Cir. 2009). Indeed, even though the playground-surfacing program involves a direct transfer of funds to the Learning Center, the court concludes that "it now seems rather clear that Missouri could include the Learning Center's playground in a non-discriminatory Scrap Tire program without violating the Establishment Clause." *Ante* at 7. I agree. *See Am. Atheists*, 567 F.3d at 295 (collecting cases to demonstrate that the Supreme Court "has sustained a number of neutral aid programs that distributed aid directly to religious organizations—without filtering the aid through private choice—where the aid itself had no religious content and any actual diversion was de minimis"). And I, of course, agree with the court that, in many cases, a concern about giving money directly to a church-run school may amount to a historic and substantial state interest. Indeed, were it to be uncovered during discovery that the Learning Center regularly uses its playground for religious activities, my Free Exercise concern would be less acute. However, at this stage of the litigation, I cannot conclude that the Department's concern about direct funding for a rubber playground surface translates into a historic and substantial antiestablishment concern.

In concluding that Trinity Lutheran has stated a claim under the Free Exercise Clause, I acknowledge that "[t]he precise bounds of the *Locke* holding . . . are far from clear." *Colo. Christian*, 534 F.3d at 1254. However, the best reading of *Locke*, in my view, is that in the absence of a historic and

substantial interest, the Department's "latitude to discriminate against religion . . . does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *See id.* at 1255. I therefore respectfully dissent from the court's affirmance of the dismissal of Trinity Lutheran's Free Exercise claim. Because this claim is linked to Trinity Lutheran's Equal Protection claim, I dissent from the court's disposition of this claim as well. *See Locke*, 540 U.S. at 720 n.3. Moreover, because I would reverse the district court's dismissal of Trinity Lutheran's complaint, I need not reach the separate question of whether the district court abused its discretion by denying Trinity Lutheran's motion to amend that complaint. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 n.2 (5th Cir. 2009); *see also Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 358 n.70 (5th Cir. 1989) ("For purposes of our remand, we only point out to the trial court that the leave to amend should be freely granted and denied only upon a showing of prejudice to the other party."). I otherwise concur with this court's opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-1382

Trinity Lutheran Church, of Columbia, Inc.

Appellant

v.

Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program

Appellee

National Association of Evangelicals

Amicus Curiae

The Becket Fund for Religious Liberty

Amicus on Behalf of Appellant(s)

American Civil Liberties Union Foundation, et al.

Amici on Behalf of Appellee(s)

Christian Legal Society

Amicus Curiae

Appeal from U.S. District Court for the Western District of Missouri – Jefferson City
(2:13-cv-04022-NKL)

ORDER

The petition for rehearing en banc is denied by an equally divided court. The petition for panel rehearing is also denied.

Judges Riley, Smith, Colloton, Gruender and Shepherd would grant rehearing en banc.

August 11, 2015

Ordered Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
MISSOURI
CENTRAL DIVISION

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,	)	
Plaintiff,	)	No. 2:13-CV-04022-NKL
v.	)	
SARAH PARKER PAULEY, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program,	)	
Defendant.	)	

ORDER

Defendant Sara Parker Pauley, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program ("Department"), moves to dismiss the Complaint of Plaintiff Trinity Lutheran Church of Columbia, Inc. ("Trinity"). [Doc. # 9]. For the reasons

set forth below, Pauley's motion to dismiss is GRANTED and this case is DISMISSED, with prejudice.

I. Background

Trinity is a church that operates a preschool and daycare called the Learning Center. The Learning Center is a ministry of the church and incorporates daily religious instruction. Through the Learning Center, Trinity teaches a Christian world view to the children enrolled in these programs, including the Gospel. The Learning Center's policy is to admit students of any sex, race, color, religion, nationality, and ethnicity.

The Department of Natural Resources Solid Waste Management Program runs the Scrap Tire Program, which competitively awards grants to qualifying organizations for the purchase of recycled tires to resurface playgrounds. Due to the limited funds available for this program, the Department grades and ranks the applications it receives and only gives grants to those organizations that best serve the program's purposes. Both public and private nonprofit day care centers and other nonprofit entities are eligible to submit grant applications. However, the Department has a policy that prohibits organizations from participating if the applicant is owned or controlled by a church, sect or denomination of religion. It contends that this policy is consistent with Article 1, Section 7, of the Missouri Constitution which prohibits public money being used to aid religion.

Seeking to improve the safety of the surface area of its playground, Trinity, through the Learning Center, applied for a grant under the 2012 Scrap Tire Program. Trinity's grant application was graded and ranked fifth out of forty-four applications. Although a total of fourteen grants were awarded in 2012, Trinity's grant application was denied because of the Department's policy to not give grants to religious organizations.

Trinity now sues Pauley, who is named solely in her official capacity as the Director of the Missouri Department of Natural Resources Solid Waste Management Program. Trinity's Complaint claims that the denial of its grant application violated Article I, Section 7 of the Missouri Constitution, the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise, Establishment and Free Speech Clauses of the First Amendment.

II. Discussion

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Pauley moves to dismiss Trinity's Complaint for failure to state a claim. When considering a motion to dismiss, the Court must accept as true the factual allegations contained in the complaint, and draw all reasonable inferences in favor of the plaintiff. *See Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012).

A. Missouri Constitution Article I, Section 7

Trinity claims that when the Department refused to allow it to participate in the Scrap Tire Program, the Department impermissibly discriminated against Trinity in violation of Article I, Section 7 of the Missouri Constitution. Section 7 provides "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof . . .; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Mo. Const. Art. I, § 7.

Trinity relies on the second clause of Section 7 for the proposition that the Department cannot deny Trinity funding merely because it is a church as this would be discrimination toward a religious organization. Pauley counters that both parts of Section 7, the prohibition on state aid to a church and the prohibition on discrimination against a church, must be read in harmony. Since state aid to a church is prohibited in the first clause, Pauley contends that the State's refusal to give aid to religious organizations could not constitute discrimination contemplated by the second clause. Instead, the second clause prohibits preference for or discrimination between religious sects or denominations.

It is a basic rule of statutory construction that each section of a statute must be interpreted in harmony with all sections of the statute. *Frye v. Levy*, No. SD 32307, 2013 WL 1914393, at *4 (Mo.

App. S.D. May 9, 2013). The same principle applies to constitutional construction. *See Boone Cnty. Court v. State*, 631 S.W.2d 321, 324 (Mo. 1982). Section 7 contains two provisions—the prohibition on direct or indirect public aid to a church and the prohibition on discrimination against a church. Construing both clauses in harmony, it is not possible to read Section 7 to prohibit public aid to a church while concurrently considering denial of that aid to be discriminatory. Such a reading is inconsistent with the entirety of Section 7. Therefore, the Court concludes that a Missouri court addressing this issue would find that when a state complies with the directive in clause one of Section 7 (no aid to religious organizations), it does not violate the second clause (discrimination against religion). Thus, the next issue is whether the first clause of Section 7 would be violated if funding were given to Trinity.

Trinity contends that the Scrap Tire Program grants are not public funds expended in direct or indirect aid to a church and, therefore, giving it a grant would not violate the anti-aid provision of Section 7. At oral argument, Trinity put forth a "quid pro quo" theory of aid based on the premise that both parties to a contract have mutual obligations. Trinity argues that while the State provides funds for the purchase of the scrap tires and delivery, Trinity is contractually bound to promote the Scrap Tire Program and educate the public about the benefits of recycling. Indeed, Trinity argues that acceptance of the funding will actually result in a greater burden to Trinity because it must find a scrap tire vendor

and install the materials at its own cost. Additionally, Trinity contends that the receipt of such funds will actually aid the State by reducing landfills and decreasing pollution. In essence, Trinity argues that if public funding will result in additional obligations (advertising the Program and educating the public) and additional financial burdens (installing scrap tires) for the recipient, then such funding is merely quid pro quo and not public aid within the meaning of Section 7.

In developing this quid pro quo theory Trinity relies upon its reading of the Missouri Supreme Court case *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976). In that case, the Court upheld a state statute directing tuition grants to college students attending approved public or private colleges, including private religious colleges, so long as the educational training received was non-religious in nature. *Id.* at 713-14. The grant program did not directly pay the funds to private institutions; rather, the students received an individual check and would then endorse it over to the institution of their choice, so long as that institution had an independent board and a policy of academic freedom. *Id.* at 715, 720-21. Trinity references a passage in *Americans United* in which supporters of the tuition grant program argued that the grants did not constitute "aid" because they did not fully cover the cost of the students' education and the institutions receiving the grants did not make a profit. *Id.* at 721. In other words, according to *Americans United*, the tuition grants "were not gifts or donations by the students to the institutions, but were the quid pro

quo in return for which the institutions were contractually required to make available the opportunities for the students to obtain a college education....[T]he cost to each institution of furnishing to its students their educational opportunities is always far greater than the amount of tuition received." *Id.*

At oral argument, Trinity maintained that this passage represented the Missouri Supreme Court's holding that quid pro quo exchanges of public funding in return for obligations to utilize such funding in a prescribed manner cannot be considered "aid" under Section 7. However, Trinity grossly misrepresents the Missouri Supreme Court's analysis and holding in that case. The Missouri Supreme Court merely quoted an argument presented by supporters of the tuition grant program and did not approve or in any way advance that argument. Instead, it found that the statute in question did not violate Section 7 because the students directly received the tuition grants from the state and could only attend schools with independent boards not under the control of a religious creed or church. *Id.* at 720-21. In the interests of judicial deference to the legislative process, the Missouri Supreme Court found that the tuition grant program "embod[ied] the will of the people." *Id.* at 721. This Court has not found nor has Trinity cited any Missouri case that defines Section 7 "aid" according to Trinity's quid pro quo theory, and the Court is unpersuaded that such a definition would make any sense given the complex factual disputes and

nuanced judgments that such a definition would precipitate.

Furthermore, there is a long tradition of Missouri state courts recognizing a "high wall of separation between church and state" based on the state constitution. *A.B. v. Liberty United Methodist Church*, No. WD 59922, 2002 WL 31890054, at *5 (Mo. App. W.D. 2002). The Missouri Supreme Court has long interpreted the State's constitution to be "more 'restrictive' than the First Amendment to the United States Constitution in prohibiting expenditures of public funds in a manner tending to erode an absolute separation of church and state." *Ams. United*, 538 S.W.2d at 720; *accord St. Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721, 729 (Mo. 2007). *See also Paster v. Tussey*, 512 S.W.2d 97, 101-02 (recognizing that the Missouri Constitution's requirement of separation of church and state is "not only more explicit but more restrictive" than that of the United States); *Berghorn v. Reorganized Sch. Dist. No. 8*, 260 S.W.2d 573, 582-83 (Mo. 1953) (finding that Missouri has an "unqualified policy...that no public funds or properties, either directly or indirectly, be used to support or sustain any school affected by religious influences or teachings or by any sectarian or religious beliefs or conducted in such a manner as to influence or predispose a school child towards the acceptance of any particular religion or religious beliefs.") (internal quotations omitted).

In light of the higher wall of separation between church and state present in the Missouri

Constitution, the Missouri Supreme Court has, on multiple occasions, strictly interpreted Section 7 to prohibit public funding of religious institutions. The Missouri Supreme Court's reasoning has persisted since its early inception in *Harfst v. Hoegen*, 163 S.W.2d 609 (Mo. 1941), where the Missouri Supreme Court asserted that Section 7 contained an "explicit interdiction of the use of public money" for religious instruction. *Id.* at 613-14. In *Harfst*, the State took over a parochial school and brought it into the public school system to be funded as such. *Id.* at 610. However, the school retained several aspects of its parochial origins, such as renting the school building from the church, employing teachers from the church, and incorporating religious curriculum into daily instruction. *Id.* at 614. The teachers expressly acknowledged that their faith required them to instruct the students in the tenets of their religion. *Id.* at 614. The Missouri Supreme Court held that the use of public funds for this school would violate Section 7, stating that the "constitutional policy of our State has decreed the absolute separation of church and state, not only in governmental matters, but in educational ones as well." *Id.*

The Missouri Supreme Court has followed this line of reasoning to find various categories of public aid to religious institutions impermissible that may have otherwise been allowed under the Federal Constitution. For example, it deemed the use of public funds to transport students to parochial schools to be unconstitutional in *McVey v. Hawkins*, 258 S.W.2d 927 (Mo. 1953), while the United States Supreme Court upheld a similar statute in New

Jersey in *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947). Similarly, while the Missouri Supreme Court found a statute that required the use of public funds to purchase textbooks for students and teachers in private non-profit elementary and secondary schools, including parochial institutions, to be unconstitutional in *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974), the United States Supreme Court has found no violation under the Federal Constitution. *See, e.g., Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).

Trinity argues, however, that the Missouri Supreme Court's long-held "high wall" has begun to crumble in recent years. Trinity primarily relies upon the Missouri Supreme Court's decision in *St. Louis University v. Masonic Temple Association of St. Louis*, 220 S.W.3d 721 (Mo. 2007), to support its proposition that "public monies have gone to churches and religious organizations with the blessing of the state." [Doc. #20 at 18]. However, this statement mischaracterizes the Missouri Supreme Court's holding in that case. The City of St. Louis granted St. Louis University public aid through tax increment financing ordinances for the construction of a new arena. *Id.* at 724. The Missouri Supreme Court found these ordinances to be constitutional after first determining that, under Article I, Section 7 and Article IX, Section 8,[1] St. Louis University was

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[1] The Court has often interpreted Article I, Section 7 alongside Article IX, Section 8, which provides that "[n]either the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make

not controlled by a religious creed and therefore the with the Jesuits, in practice an independent institution.

The Missouri Supreme Court's holding in *St. Louis University* reflects a consistent recognition of the unique circumstances involved in the State's relationship with private institutions of higher education, many of which have historical ties with a particular denomination of religion. Thirty years earlier in *Americans United*, the Missouri Supreme Court upheld a tuition grant aid program to students who attended public or private colleges and universities after finding that the institutions needed to have independent boards and policies of academic freedom. 538 S.W.2d at 720-21. It stressed that student attendance at private colleges and universities "does not have the same religious implications or significance" found in elementary or secondary schools. *Id.* at 721. It distinguished its decision from the prior "parochial school cases," such as *Harfst*, by emphasizing that "institutions of higher education are able to boast of academic freedom, institutional independence, objective instruction, lack of indoctrination, faculty autonomy, mature students, and a diversity of religious

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an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever:...." Mo. Const. art. IX, § 8. Missouri courts often construe these two sections together to represent Missouri's establishment clause. *See, e.g., St. Louis Univ.*, 220 S.W.3d at 725.

background in faculty and students." *Id.* at 722 (internal quotations omitted).

The Missouri Supreme Court's decisions in *Americans United* and *St. Louis University* are not examples of public aid to religious institutions with the "blessing of the state," as characterized by Trinity's counsel. Rather, these cases can be distinguished from Missouri jurisprudence regarding the high wall of separation between church and state in two distinct ways. First, the Missouri Supreme Court in both cases makes clear that the religious institutions receiving aid, indirectly through the students in *Americans United* and through the developer in *St. Louis University*, were not controlled by a church or religious creed. This stands in contrast to the facts in *Harfst*, *McVey*, and *Paster*, in which the institutions receiving aid were parochial or former parochial schools under the control of the church. Second, the schools in *Americans United* and *St. Louis University* were institutions of higher education. Although the Missouri Constitution makes no explicit distinction between institutions of higher education and primary or secondary schools in Article I, Section 7, the Missouri Supreme Court has, on several occasions, considered it to be a relevant factor. In *Americans United*, for example, it emphasized the differences between parochial elementary and secondary schools on the one hand and universities on the other, based on the fact that the latter had greater academic freedom, mature students, and secular curriculum. *See also Menorah Med. Ctr. v. Health & Educ. Facilities Auth.*, 584 S.W.2d 73, 87 (Mo. 1979) (considering recipient

universities' status as institutions of higher education, "as opposed to elementary or secondary level," to be a factor in finding no excessive entanglement in a financing program authorized by state law and operated by a non-state entity). This distinction between institutions of higher education and primary or secondary schools emphasizes the Missouri Supreme Court's concern with the degree of control a church, creed, or religious domination may have over the administration, management, and curriculum development at a school. When that degree of control was so great that the school was, in essence, serving as a proxy or branch of the church, the Missouri Supreme Court has consistently held that public aid, direct or indirect, would be impermissible.

Thus, the allegations in Trinity's complaint show that public funding through the Scrap Tire Program would be impermissible under Section 7. First, the Learning Center, which merged with Trinity in 1985, today remains part of and run by the Church. Trinity alleges that the Learning Center is a "ministry" of the Church that directly instructs students in the Church's religious beliefs. Particularly, Trinity notes the "[t]he Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well to bring the Gospel messages to non-members." [Doc. #1 at 4]. Unlike the colleges and universities in *St. Louis University* or *Americans United*, the Church controls the Learning Center. It utilizes religious curriculum in daily activities in its pre-school and daycare by

"teaching a Christian world view." *Id.* Its students are children, not mature adults instructed by faculty with diverse religious backgrounds. By all indications, Trinity has pled that its Learning Center is a part of the Church and is used to inculcate its religious beliefs to children in the pre-school and daycare. Missouri courts have consistently held that public aid to such an organization is prohibited under the State constitution.

In conclusion, Section 7 clearly prohibits public money from, directly or indirectly, going to aid a church, sect, or denomination of religion. Trinity's own pleadings demonstrate that funds from Pauley's department in the form of the Scrap Tire Program would aid the Church and its ministry Learning Center within the meaning of Missouri law. As the Missouri Constitution prohibits such aid, the Department's refusal to grant it cannot be considered discrimination under Section 7. To hold otherwise would permit the second half of the section to obviate the first, in that complying with the prohibition of aid to a church would violate the prohibition on discrimination against a church. Thus, Trinity's claims based on the Missouri Constitution must fail.

This conclusion also obviates Trinity's claim during oral argument that discovery is necessary regarding the State's legitimate interest in denying Trinity's grant application. The Court has rejected Trinity's interpretation of "aid" as it is used in Article 7, so discovery about the benefits and

burdens of the scrap metal program are not relevant. Trinity's counsel also sought discovery about whether the State consistently complies with Article 7, but Trinity has failed to identify any evidence that might support its claim, nor has it shown that a state could ever forfeit its interest in complying with its own laws.

B. Free Exercise

Pauley also argues that Trinity's Complaint fails to state a claim for a violation of the Free Exercise Clause of the First Amendment because Trinity and its members were not prevented from exercising any religious practice, merely because they could not get funding from the State.

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. Amend. I. With respect to this clause, the Supreme Court has explained, "[t]he crucial word in the constitutional text is 'prohibit.' For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Put differently, this clause provides "'protection from certain forms of governmental compulsion,'" *United States v. Means*, 858 F.2d 404, 406 (8th Cir. 1988) (quoting *Bowen v. Roy*, 476 U.S. 693, 700 (1986)), but generally does not provide a basis for "[d]emands for affirmative

governmental assistance," *United States v. Friday*, 525 F.3d 938, 957 (10th Cir. 2008). *See also Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them."). As Trinity's claim is based solely on the denial of an affirmative benefit, Pauley argues that the Complaint fails to state a claim for a violation of the Free Exercise Clause.

In response, Trinity argues that the Free Exercise Clause is implicated in this case because the decision to deny Trinity's grant application targeted Trinity for disparate treatment on the basis of religion. In support, Trinity cites a string of cases, beginning with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993), which hold that, under the Free Exercise Clause, a court must strictly scrutinize any law that burdens religious practice and is not neutral and generally applicable. Trinity maintains that strict scrutiny applies in this case because the policy of not awarding grants to sectarian institutions is not neutral and generally applicable and that this policy cannot withstand strict scrutiny review. However, as discussed in detail below, Trinity's Free Exercise claim erroneously conflates what a state may do without violating the Establishment Clause of the First Amendment with what a state must do under the Free Exercise Clause.

In each of the cases cited by Trinity to support its Free Exercise claim, the ordinance or regulation at issue directly prohibited or restricted the exercise of a religious practice. *See, e.g.*, *Lukumi*, 508 U.S. at 542, 547 (1993) (invalidating a series of ordinances that prohibited the ritual slaughter of animals, which "had as their object the suppression of religion."); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167-68 (3d Cir. 2002) (finding that the discriminatory enforcement of an ordinance, which was selectively applied to prohibit the Orthodox Jewish practice of hanging *lechis* while permitting other, comparable secular and non-secular hangings, "violate[d] the neutrality principle of *Lukumi*"); *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995) (holding that a series of Army regulations were not neutral where the regulations "uniformly ban[ned] all religious practice"); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232-34 (11th Cir. 2004) (finding that a zoning ordinance that excluded religious groups from a certain district but not similarly situated secular groups "improperly targeted religious assemblies"). By contrast, the denial of an affirmative benefit from the government "is of a 'wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.'" *Means*, 858 F.2d at 407 (quoting *Roy*, 476 U.S. at 704); *see also Johnson v. Robison*, 415 U.S. 361, 385-86 (1974) ("The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all.").

As a result, the present case is decidedly more analogous to *Locke v. Davey*, 540 U.S. 712, 715 (2004), wherein the Supreme Court upheld the state of Washington's decision to exclude students pursuing degrees in devotional theology from its Promise Scholarship Program. This program provided postsecondary students with state-funded scholarships for educational expenses, provided that the students met certain requirements. *Id.* at 715. Each year, the funds available for the program were "evenly prorated among the eligible students." *Id.* 716. In accordance with Washington's constitutional prohibition on providing grants to students pursuing degrees "that are 'devotional in nature or designed to induce religious faith,'" eligible students were precluded from using the scholarship to pursue a degree in theology. *Id.* After the plaintiff in *Locke* was denied a Promise Scholarship due to his decision to pursue a devotional degree, the student filed suit, alleging, *inter alia*, a violation of the Free Exercise Clause. *Id.* at 717-18. The district court granted summary judgment in favor of the State and the Court of Appeals for the Ninth Circuit reversed, finding that, under *Lukumi*, strict scrutiny applied because the State had targeted religion for unfavorable treatment. *Id.* at 718.

The Supreme Court reversed, holding that "such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment." *Id.* at 715. The Court began by reiterating that, while the two Religion Clauses "are frequently in tension," its precedents have "long said that there is room for play in the joints between

them," meaning "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id.* at 718-19 (quotation omitted). In upholding the plaintiff's exclusion from the scholarship program, the Supreme Court considered and rejected the plaintiff's argument that, under *Lukumi*, the scholarship program "is presumptively unconstitutional because it is not facially neutral with respect to religion." *Id.* at 720. The Supreme Court reasoned that accepting this claim "would extend the *Lukumi* line of cases well beyond not only their facts but their reasoning." *Id.* at 720. On this point, the Supreme Court went on to explain:

> In *Lukumi*, the city of Hialeah made it a crime to engage in certain kinds of animal slaughter. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. . . . In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. . . . And it does not require students to choose between their religious beliefs and receiving a government benefit... The State has merely chosen not to fund a distinct category of instruction.

Id. at 720-21. Accordingly, because this scholarship program did not "evinc[e] the hostility toward

religion which was manifest in *Lukumi*," the Court could not "conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 724-25. "Without a presumption of unconstitutionality," the Court held, this "claim must fail." *Id.* at 725.

Trinity argues that *Locke* is distinguishable because the holding in *Locke* was explicitly limited to funding the religious training of clergy, and the *Locke* decision was based, at least in part, on a longstanding aversion to using tax dollars to fund the ministry and the concomitant finding that there are "few areas in which a State's antiestablishment interests come more into play." *Id.* at 722-23. But this does not mean that the reasoning of *Locke* is inapplicable in other contexts. *See Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1254 (10th Cir. 2008) ("[W]e are disinclined to think that *Locke* is confined to its facts. . . . Presumably, there are other forms of state decisions not to fund religious instruction that would pass muster under the Free Exercise Clause beyond the clergy training involved in *Locke*."); *Eulitt ex rel. Eulitt v. Me., Dep't of Educ.*, 386 F.3d 344, 355 (1st Cir. 2004) ("The appellants endeavor to cabin [*Locke*] and restrict its teachings to the context of funding instruction for those training to enter religious ministries. Their attempt is unpersuasive. We find no authority that suggests that the room for play in the joints identified by the [*Locke*] Court, . . . is applicable to certain education funding decisions but not others." (quotation omitted)).

Furthermore, Trinity's attempt to distinguish *Locke* on this basis is particularly unpersuasive here, because this case raises antiestablishment concerns that are at least comparable to those relied on by the Court in *Locke*. In particular, Trinity ultimately seeks the direct payment of government funds to a religious institution. Unlike in *Locke*, where "the link between government funds and religious training [was] broken by the independent and private choice of recipients" and so there was "no doubt" that the state could have provided scholarships to students pursuing devotional degrees without offending the Establishment Clause, *id.* at 719, the grant at issue in this case would be paid directly to a religious preschool and daycare. The Supreme Court has repeatedly and consistently cautioned that "special Establishment Clause dangers" arise "where the government makes direct money payments to sectarian institutions." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995); *accord Mitchell v. Helms*, 530 U.S. 793, 818-19 (2000); *see also Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 11 (1947) (examining the historical origin of the First Amendment and concluding that "[t]he imposition of taxes to pay ministers' salaries *and to build and maintain churches and church property* aroused [the colonists'] indignation. It was these feelings which found expression in the First Amendment." (emphasis added)). As a result, Supreme Court precedent draws "a consistent distinction between government programs that provide aid directly to religious schools, . . . and programs of true private choice, in which government aid reaches religious schools only

as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002) (citations omitted). While it is well-established that the latter is generally permissible, *id.*, "[i]t is equally well-settled . . . that the State may not grant aid to a religious school, whether cash or inkind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487, (1986) (citing, *inter alia*, *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973)).

In *Nyquist*, for instance, the Supreme Court held that a New York statute that provided for direct money grants to sectarian schools to be used for the maintenance and repair of school facilities violated the Establishment Clause. *Nyquist*, 413 U.S. at 774-80. The Supreme Court based its decision largely on the fact that the statute did not "restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes." *Id.* at 774 ("Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities."). After a thorough review of its precedent on this issue, the Supreme Court concluded:

> If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be

> used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.

Id. at 413 776-77; *see also Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 613-14 (7th Cir. 2001) (holding that, under *Nyquist*, a Wisconsin program that provided direct grants to sectarian schools for the purpose of subsidizing telecommunications access violated the Establishment Clause because the money could be used "for connection time to view a religious website"). There is no reason to suspect that this rule is any less applicable where the facility in question belongs to a preschool or daycare.[2]

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[2] If anything, providing direct aid to a religious preschool is less likely to withstand an Establishment Clause challenge. In *Tilton v. Richardson*, 403 U.S. 672, 674-75, 689 (1971), a plurality upheld the provision of government grants to sectarian colleges and universities for the construction of buildings, provided that the buildings were used exclusively for secular purposes. In reaching this conclusion, however, the plurality emphasized that:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and

Trinity has not claimed that its playground is used exclusively for secular purposes and the allegations in its Complaint suggest that it is not. According to the Complaint:

> The Learning Center is a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program. [ ] Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of Boone County

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secondary schools. The affirmative if not dominant policy of the instruction in pre-college church schools is to assure future adherents to a particular faith by having control of their total education at an early age... There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students. . . . Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities.

Id. at 685-86, (quotation and citation omitted).

> and the surrounding area. . . . The Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well as to bring the Gospel message to non-members.

[Doc. # 1 at 4]. It is thus clear from the face of the Complaint that religious instruction is a central element of the preschool and daycare offered through the Learning Center, and there is nothing in the Complaint to suggest that this instruction does not extend to the playground.

Thus, using taxpayer-raised funds to refurbish Trinity's playground, no matter how innocuous, raises Establishment Clause concerns even if such use of funds would not violate the Establishment Clause. *See Nyquist*, 413 U.S. at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. . . . 'No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.'" (quoting *Everson*, 330 U.S. at 16); *see also Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1098 (8th Cir. 2000) ("[S]ection 4454 does not cause government aid to flow to 'pervasively sectarian institutions,' the funding of which constitutes an improper benefit to religion. . . . A pervasively sectarian institution is one in which

religion so pervades its functions that *any* government aid it receives, *even if designated for secular activities*, impermissibly assists religion because the institution is unable to separate the funded secular activities from its religious mission." (emphases added)):[3] *Strout v. Albanese*, 178 F.3d 57, 63 (1st Cir. 1999) ("The historic barrier that has existed between church and state throughout the life of the Republic has . . . acted as an insurmountable impediment to the *direct* payments or subsidies by the state to sectarian institutions, particularly in the context of primary and secondary school.").

That said, the question of whether awarding a scrap tire grant directly to Trinity would violate the Establishment Clause is not at issue in this case, and so it is neither necessary nor appropriate to resolve this question here. Nonetheless, the existence of a longstanding and legitimate antiestablishment

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[3] Though heavily criticized by the plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), the pervasively sectarian test remains the test that this Court, under both Supreme Court and Eighth Circuit precedent, is bound to apply. *See Min De Parle*, 212 F.3d at 1098; *Steele v. Indus. Dev. Bd. Of Metro. Gov't Nashville*, 301 F.3d 401, 408 (6th Cir. 2002) (concluding that, although "[t]he vitality of the pervasively sectarian test is questionable in light of *Mitchell*, because "*Mitchell* is a plurality opinion. . . .the district court, and this Court, are still bound by pre-*Mitchell* law with regard to the pervasively sectarian doctrine. . . .Further, the Supreme Court has specifically stated that the lower courts are to treat its prior cases as controlling until the Supreme Court itself specifically overrules them. . . .It is for the Supreme Court, not this Court, to jettison the pervasively sectarian test, which it has not done.").

interest makes this case nearly indistinguishable from *Locke*. As a result, even assuming that providing a tire scrap grant to Trinity would not violate the Establishment Clause, this Court cannot conclude that the exclusion of a religious preschool from this aid program is constitutionally suspect under the Free Exercise Clause in light of the longstanding and substantial concerns about direct payment of public funds to sectarian schools. *Cf. Locke*, 540 U.S. at 725 (determining that "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology," but nonetheless holding that "[g]iven the historic and substantial state interest at issue, we [] cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect."); *Eulitt ex rel. Eulitt*, 386 F.3d at 355 (concluding that the *Locke* Court "recognized that state entities, . . . may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so.").

As in *Locke*, the exclusion from the tire scrap grant program places a relatively minor burden on Trinity. *Cf. Locke*, 540 U.S. at 720 ("In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. . . . [T]he exclusion of such funding places a relatively minor burden on Promise Scholars."). In fact, unlike the scholarships in *Locke*, which each applicant who met the basic requirements was guaranteed to receive, *id.* at 716, the tire scrap grants are competitively awarded

because of the limited funds available for the program. [Doc. # 1 at 6]. According to the Complaint, only fourteen of the forty-four applicants received tire scrap grants in the year Trinity applied. [Doc. # 1 at 6]. As a result, Trinity is no worse off than any of the thirty, secular institutions that applied for grants and did not receive them.

Furthermore, it is not unreasonable that the state of Missouri, in determining how to apportion the limited funds available for this program, would choose to exclude a religious preschool and daycare based on antiestablishment concerns arising under both the First Amendment[4] and its own, significantly more restrictive Constitution. Nothing in the Complaint suggests that the decision to deny Trinity's grant application was motivated by hostility toward religion as opposed to a legitimate interest in avoiding government entanglement with religion. Furthermore, "it would be illogical to impose upon government entities a presumption of hostility [toward religion] whenever they take into account plausible entanglement concerns in making decisions in areas that fall within the figurative space between the Religion clauses. *Eulitt ex rel. Eulitt*, 386 F.3d at 355.

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[4] While the Locke Court characterized the State of Washington's interest in not funding the religious instruction of future clergy as "substantial," Locke, 540 U.S. at 725, the Court has also suggested "that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

Finally, while there is comparatively little authority directly addressing this issue, lower courts have consistently rejected Free Exercise claims in analogous circumstances. In *Strout*, for instance, the First Circuit upheld a statute that offered grants directly to private educational institutions, provided that they were "non-sectarian," to subsidize the education of students residing in communities without public education facilities. *Strout*, 178 F.3d at 59. In upholding the prohibition on providing subsidies directly to religious schools attended by students who otherwise qualified for the grants, the *Strout* court considered and rejected the claim that this restriction violated "the Free Exercise Clause... because it excludes funding of sectarian education solely on the basis of religion." *Id.* at 65. The *Strout* court reasoned that the Free Exercise Clause was "not implicated" in this context because the decision not to subsidize sectarian schools in no way prevented students from attending religious schools; "[a]ll it means is that the cost of religious education must be borne by the parents and not the state." *Id.* The *Strout* court also concluded that the Supreme Court's decision in *Lukumi* was "inapposite," because there had not been any suggestion that the restriction on subsidies to sectarian schools was motivated by "a substantial animus" against religion. *Id.* Following the Supreme Court's decision in *Locke*, the First Circuit had cause to revisit its decision in *Strout* and concluded that "recent Supreme Court jurisprudence reinforces rather than undermines *Strout's* conclusion that [the challenged statute] perpetrates no free exercise violation." *Eulitt ex rel. Eulitt*, 386 F.3d at 356.

Similarly, in *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376, 378 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974), a three judge panel, with one judge dissenting, rejected the claim that the state of Missouri's decision to provide bus transportation for students attending public but not parochial schools violated the Free Exercise Clause. The plaintiffs in *Luetkemeyer* argued, as Trinity does here, that the denial of this benefit "force[d] them to forego the exercise of their right to freely exercise their religion in order to secure a public benefit, and penalize[d] the free exercise of religion in violation of the First Amendment." *Id.* at 377-78. In rejecting this contention, the court first reasoned that "[p]rinciples which state what a State *may* do may not properly be read as a command to what a State *must* do." *Id.* at 381; *accord McCarthy v. Hornbeck*, 590 F. Supp. 936, 943 (D. Md. 1984). For support, the *Luetkemeyer* court relied on the Supreme Court's decision in *Norwood v. Harrison*, 413 U.S. 455, 462 (1973), wherein "[t]he Appellees intimate[d] that the State must provide assistance to private schools equivalent to that which it provides to public schools." In response, the *Norwood* Court ruled:

> Clearly, the State need not. Even as to church-sponsored schools, whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The Religion Clauses of the First Amendment strictly confine state aid to

> sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance.

Norwood, 413 U.S. at 462. Based on this reasoning and Missouri's "long history of maintaining a very high wall between church and state," the *Luetkemeyer* court concluded "that the Constitution of the United States does not compel the state of Missouri to provide equal transportation services to private and church-sponsored schools and that it may, as it has, elect to provide such service only for its public schools." *Luetkemeyer*, 364 F. Supp. at 387.

Two years earlier, in *Brusca v. Missouri ex rel. State Board of Education*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd sub nom.*, *Brusca v. State Board of Education*, 405 U.S. 1050 (1972), a three judge panel for the Eastern District of Missouri unanimously reached the same conclusion. The plaintiffs in *Brusca* claimed that Missouri's constitutional prohibition on the use of public funds to aid sectarian schools impaired their free exercise rights and denied them equal protection under the law. *Id.* at 276. In concluding that the First Amendment did not require equal allocation of public assistance to secular and religious schools, the *Brusca* court first remarked, "The issue presented . . . is not so much

what Missouri *may* do but what it *must* do in aid of religious education." *Id.* From here, the court reasoned:

> [A] parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's non-public school education in whole or in part in order that he may obtain a religious education. . . [T]o the extent the Religion Clauses of the First Amendment do not prohibit such financial aid, they do not require that it be given by the State. . . .We find nothing arbitrary or unreasonable in the determination of the State to deny its funds to sectarian schools or for religious instruction.

Id. at 277, 279. In an analogous case, on appeal from the Central District of California's decision entering judgment for the state of California, the Ninth Circuit "deferred decision . . . awaiting the outcome of the appeal in *Brusca*." *Jackson v. California*, 460 F.2d 282, 283 (9th Cir. 1972) (per curiam). After the Supreme Court affirmed, the Ninth Circuit, "[o]n authority of *Brusca*," affirmed the district court's decision. *Id.*

Other courts, often citing *Brusca* and *Luetkemeyer*, have consistently reached the same conclusion. For instance, in rejecting the claim that not providing tax credits for educational expenses to parents of students attending religious schools, the Southern District of Ohio reasoned:

> While the state may grant secular, neutral, non-ideological aid to sectarian school students when such aid is granted in common to all students, . . . no *right* to such aid under the Free Exercise Clause has been established in our constitutional matrix. The broad construction of the Free Exercise Clause urged upon us by the state would for all practical purposes, render meaningless the thrust and import of the Establishment Clause. . . . [The Free Exercise Clause] has never been interpreted as placing an affirmative duty upon the state to appropriate money so that religious beliefs might be more effectively exercised or the continuing vitality of religious institutions ensured. . . The adoption of such a view would mark a profound and radical departure from the philosophy of separation of Church and State which has characterized this country from its very inception.

Kosydar v. Wolman, 353 F. Supp. 744, 764-65 (S.D. Ohio 1972), *aff'd sub nom., Grit v. Wolman*, 413 U.S. 901 (1973); *accord Valencia v. Blue Hen Conference*, 476 F. Supp. 809, 824 (D. Del. 1979) ("[W]hile the State May, without violating the Establishment Clause, provide some secular benefits which incidentally relieve the burdens assumed by parents who choose to send their children to parochial schools, it is not required to do so by the Free Exercise Clause."), *aff'd*, 615 F.2d 1355 (3d Cir. 1980); *see also McCarthy*, 590 F. Supp. at 945-46 ("The Supreme Court has consistently held that a

statute does not impinge on a constitutional right merely because it does not subsidize that right. . . . Subsidization by the state of Maryland of plaintiffs' constitutional right to send their children to church-related schools is not mandated by the First Amendment."). Against this authority, Trinity has not presented a single case that supports the proposition that the State, in establishing a program that offers grants to public and private institutions engaged in early childhood care and education, is constitutionally required to include religious institutions in the program if their inclusion would not violate the Establishment Clause.

To the extent that Trinity suggests that this case is analogous to *Sherbert*, wherein the Supreme Court held that a State may not apply the provisions governing eligibility for public welfare benefits "so as to constrain a worker to abandon her religious convictions respecting the day of rest," *Sherbert*, 374 U.S. at 410, the *Luetkemeyer* court aptly explained why the narrow holding in *Sherbert* is inapplicable in this context:

> *Sherbert* involved a request for dispensation from a general regulatory law; not a request or demand for a public service. While the exemption or dispensation would clearly result in some aid to a particular individual, it did not involve the expenditure of state funds which would, in fact, indirectly aid a religious institution. The Court simply did not have the latter question before it. Justice Douglas appropriately pointed out in his

> concurring opinion, that 'this case does not involve the problems of direct or indirect state assistance to a religious organization.'"

Luetkemeyer, 364 F. Supp. at 385 (citation omitted); *accord Brusca*, 332 F. Supp. at 279 ("Nothing in *Sherbert* . . . , relied on by plaintiffs, suggests a different result or implies that a state must finance or subsidize religious schools. That case did not involve any issue of direct or indirect state assistance to a religious organization."); *see also Sherbert*, 374 U.S. at 409 ("[T]he extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."). *Sherbert* has never been extended to require that religious institutions be given equal access to government funds and, absent some authority, the Court cannot adopt such an unprecedented rule here.

In conclusion, even assuming that providing a tire scrap grant to Trinity would not violate the Establishment Clause (an issue not before the Court), there is no basis for concluding that the decision to exclude religious institutions from this program did violate the Free Exercise Clause. Accordingly, Trinity's Free Exercise claim is dismissed.

C. Equal Protection

Having concluded that the Complaint fails to allege a violation of the Free Exercise Clause, Trinity's Equal Protection claim must also be dismissed. The *Locke* Court rejected the plaintiff's Equal Protection claim in a footnote, reasoning that "[b]ecause we hold, . . . that the program is not a violation of the Free Exercise Clause, . . . we apply rational-basis scrutiny to his equal protection claims." *Locke*, 540 U.S. at 720 n.3; *accord Johnson*, 415 U.S. at 375 n.14 (1974). Applying rational-basis review, the *Locke* Court easily found that Washington's scholarship program survived this level of scrutiny for the same reasons that it did not violate the Free Exercise Clause. *Locke*, 540 U.S. at 720 n.3.

From the allegations in the Complaint, it is clear that the decision to exclude religious organizations from participation in the Tire Scrap Program withstands rational-basis review. According to Trinity, the letter that explained the decision to deny Trinity's grant application stated:

> [A]fter further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that 'no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion.'

[Doc. # 1 at 6]. Thus, as in *Locke*, Trinity's exclusion from the aid program in this case was based on the Missouri Constitution's heightened separation of church and state. *Cf. id.* at 716. Whether characterized as "substantial," *id.* at 725, or "compelling," *Luetkemeyer*, 364 F. Supp. at 386, the antiestablishment concerns that motivated this decision, based on Trinity's own allegations, at least bears "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). This holds true regardless of whether providing Trinity with a grant would actually violate the Establishment Clause. *See Locke*, 540 U.S. at 719, 725 (finding that Washington had a "substantial" antiestablishment interest, despite the fact that there was "no doubt" that the State could have provided the scholarship in question without violating the Establishment Clause). Accordingly, Trinity's Equal Protection claim must be dismissed.

D. Establishment

Trinity's Establishment Clause claim is premised on the theory that the decision not to award Trinity a grant evinced hostility toward religion, in violation of the neutrality toward religion mandated by the Establishment Clause. None of the cases cited by Trinity, however, supports the proposition that the Establishment Clause entitles Trinity to relief in this case.

Specifically, in support of its theory, Trinity relies on two Supreme Court cases concerning

student access to school resources and facilities that were ultimately decided on free speech or statutory grounds. *See Rosenberger*, 515 U.S. at 822-836 (holding that the University of Virginia's exclusion of religiously motivated student publications from a policy that paid the printing costs of a variety of student publications constituted viewpoint discrimination in violation of the students' right of free speech); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. at 235-47 (holding that a public high school's refusal to officially recognize a Christian club violated the Equal Access Act, 20 U.S.C. §§ 4071-4074 and explicitly declining to "decide—and therefore express[ing] no opinion on—whether the First Amendment requires the same result."). In each of these cases, the Establishment Clause was only considered from the perspective of whether it prohibited the school from providing the funds or access that the students sought. *See Rosenberger*, 515 U.S. at 837-38; *Mergens*, 496 U.S. at 247-48. Neither of these cases can plausibly be read as requiring the State to provide a religious institution with a publicly funded subsidy by virtue of the neutrality toward religion generally required under the Establishment Clause.

Furthermore, in the only case of which the Court is aware that has directly addressed this issue, the First Circuit considered and rejected the same theory advanced by Trinity. *See Strout*, 178 F.3d at 60 ("[P]laintiff-appellants argue that the statute, . . . violates the Establishment Clause because, rather than treating religion neutrally, it demonstrates a hostility toward religion . . . ."). In concluding that

the plaintiffs' reliance on *Rosenberger* was "misplaced," the *Strout* court found "[m]ost telling . . the majority's analysis of the issues presented by that appeal." *Id.* at 63. Specifically, the *Rosenberger* Court had explained,

> The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions, ... The error is not in identifying the principle, but in believing that it controls this case. . . . [T]he Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. *We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity.* . . . [T]he undisputed fact [is] that no public funds flow directly to WAP's coffers.

Rosenberger, 515 U.S. at 842 (citations omitted) (emphasis added). Thus, the *Rosenberger* Court's conclusion that it does not violate the Establishment Clause to provide religious and secular student groups with "access to [ ] facilities on a religion-neutral basis," *id.*, can in no way be interpreted as imposing an affirmative obligation to provide direct subsidies to religious institutions. *Mergens* is distinguishable for the same reason.

As the *Strout* court persuasively reasoned, "In lauding neutrality as the keystone of Establishment Clause jurisprudence, plaintiff-appellants forget that neutrality is but one 'hallmark of the Establishment Clause.' *Rosenberger* neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." *Strout*, 178 F.3d at 63 (quoting *Rosenberger*, 515 U.S. at 846 (O'Connor, J., concurring)). The Strout court went on to conclude:

> [W]e are at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery. The Establishment Clause forbids the making of a law respecting the establishment of any religion. There is *no* relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies.

Id. at 64. Likewise, in this case, Trinity has not cited, and the Court's independent research has not revealed, a case construing the Establishment Clause in the manner urged by Trinity. Accordingly, there is no basis for concluding that Trinity is entitled to relief under the Establishment Clause and this claim must be dismissed.

E. Free Speech

Neither party ever substantively addressed Trinity's claim that the denial of its grant application violated its right to free speech under the

First Amendment. In rejecting the plaintiff's free speech claim in *Locke*, the Court reasoned:

> [T]he Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to encourage a diversity of views from private speakers. . . . Our cases dealing with speech forums are simply inapplicable.

Locke, 540 U.S. at 720 n.3; *accord Eulitt ex rel. Eulitt*, 386 F.3d at 356-57 ("The statute at issue here does not implicate the appellants' speech rights at all. As the Supreme Court made clear in *Davey*, state programs to fund general tuition costs are not fora for speech. . . . The Maine education plan deals with the provision of secular secondary educational instruction to its residents; it does not commit to providing any open forum to encourage diverse views from private speakers. Consequently, cases dealing with speech fora . . . are not relevant.").

Trinity presents no argument or authority that suggests a different result is warranted where the government program in question is designed to encourage and assist the use of scrap tires to refurbish playgrounds. There is simply no basis for concluding that the Tire Scrap Program is designed to provide an open forum encouraging diverse views from private speakers. Accordingly, for the reasons set forth in *Locke* and *Eulitt*, the Complaint fails to state a claim for a violation of Trinity's right to free

speech under the First Amendment and this claim must be dismissed.

III. Conclusion

For the foregoing reasons, Defendant Pauley's motion to dismiss, [Doc. # 9], is GRANTED and this case DISMISSED, with prejudice.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: September 26, 2013
Jefferson City, Missouri

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
CENTRAL DIVISION

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,	)	
Plaintiff,	)	No. 2:13-CV-04022-NKL
v.	)	
SARAH PARKER PAULEY, in her official capacity as Director of the Missouri Department of Natural Resources Solid Waste Management Program,	)	
Defendant.	)	

ORDER

Plaintiff Trinity Lutheran Church of Columbia, Inc. ("Trinity") has filed a motion to reconsider and for leave to file an amended complaint. [Doc. #36]. For the reasons set forth below, Trinity's motion is DENIED.

I. Background

This case concerns the denial of Trinity's application for a grant under the Missouri Department of Natural Resources Solid Waste Management Program's Scrap Tire Program, which competitively awards grants to qualifying organizations for the purchase of recycled tires to resurface playgrounds. On September 26, 2013, the Court dismissed each of the five counts in Trinity's Complaint for failing to state a claim. A more thorough account of the relevant factual background is set forth in the Court's prior order. *See* [Doc. # 34 at 1-2].

Trinity now moves to reconsider this decision and for leave to file an amended complaint that asserts new factual allegations. With respect to the latter request, Trinity seeks to add an allegation that other religious organizations have been awarded tire scrap grants in the past. Trinity's proposed amended complaint asserts claims under the Equal Protection Clause of the Fourteenth Amendment, the Free Exercise, Establishment and Free Speech Clauses of the First Amendment, and Article I, Section 7 of the Missouri Constitution.

II. Discussion

A. Motion to Reconsider

Reconsideration is warranted only to correct "manifest errors of law or fact or . . . [to] present[ ] newly discovered evidence after a final judgment."

Bradley Timberland Res. v. Bradley Lumber Co., 712 F.3d 401, 407 (8th Cir. 2013) (quotation omitted). In this case, Trinity argues that reconsideration is appropriate because the Court committed a manifest error of law by reaching the legal merits of Trinity's claims. [Doc. # 36 at 2]. In particular, Trinity argues that it was improper for the Court to reject, on a motion to dismiss, its "*quid pro quo* theory of aid" as well as its "argument that the state's funding of St. Louis University, a Catholic Jesuit University, undercut the state's alleged compelling interest." [Doc. # 36-1 at 4]. In addition, Trinity argues that the Court erred by evaluating the sufficiency of the evidence and thereby exceeded the appropriate standard of review on a motion to dismiss for failure to state a claim.

Trinity's arguments are unpersuasive, however, because the dismissal was based entirely on the deficiencies in the legal theories on which Trinity relied. A key purpose of a motion to dismiss for failure to state a claim is to "eliminate those actions 'which are fatally flawed in their legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity.'" *Wilson v. Duckett Truck Ctr.*, No. 1:12-CV-85 SNLJ, 2013 WL 384717, at *1 (E.D. Mo. Jan. 31, 2013) (quoting *Young v. City of St. Charles, Mo.*, 244 F.3d 623, 627 (8th Cir. 2001). In other words, where a claim depends upon a legal theory that is not cognizable, and therefore cannot entitle the plaintiff to relief, it is subject to dismissal. *See, e.g., Christopher & Banks Corp. v. Dillard's, Inc.*, 805 F. Supp. 2d 693, 695 (S.D. Iowa 2011) ("[A] complaint may be

dismissed as a matter of law if it lacks a cognizable legal theory . . . ." (quotation omitted)); *Harvey v. CitiMortgage, Inc.*, No. 4:10CV551 TIA, 2011 WL 1226973, at *3 (E.D. Mo. Mar. 29, 2011) ("[T]he undersigned finds that the vapor theory is not a valid legal basis to recovery, and dismisses the claims based upon such theory."); *Allen v. Jussila*, No. 08CV6366 (JNE/JSM), 2010 WL 759870, at *2 (D. Minn. Mar. 2, 2010) ("To state an actionable claim for relief, a complaint must allege a set of historical facts, which, if proven true, would entitle the plaintiff to some legal redress against the named defendants under some established legal theory.").

In this case, the Court found that Trinity's *quid pro quo* theory for defining "aid," as that term is used in Article I, Section 7 of the Missouri Constitution, was premised entirely on a misrepresentation of the Missouri Supreme Court's decision in *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. 1976) (en banc). [Doc. # 34 at 6]. Yet, this was the only authority cited by Trinity in support of its position and the Court's own research revealed no decision, state or federal, that recognized or adopted Trinity's proposal. Based on this complete lack of authority, the inherent problems in Trinity's anomalous proposal for defining aid, and the Missouri Supreme Court's historically strict interpretation of Section 7, the Court declined to accept Trinity's unprecedented premise. [Doc. # 34 at 6-13]. Accordingly, to the extent that Trinity's claim under Section 7 rested on its *quid pro quo* theory, this claim was properly dismissed due to Trinity's failure to provide any legal support for its position

and the weight of authority to the contrary. Furthermore, absent the adoption of Trinity's definition of aid, Trinity's claim under Section 7 failed as a matter of law because it was contrary to fundamental principles of constitutional interpretation. [Doc. # 34 at 12-13].

In addition, the Court did not, as Trinity suggests, make a factual finding that Missouri had a compelling interest in excluding Trinity from the scrap tire program. Rather, the Court concluded that Trinity had failed to identify any cognizable legal theory that would require Missouri to make such a showing in order to justify its decision to exclude a religious preschool and daycare from the tire scrap grant program. Specifically, the Court held that, under *Locke v. Davey*, 540 U.S. 712 (2004), and in light of the overwhelming consensus among the lower courts that have addressed the issue, Trinity's claim that this exclusion violated the Free Exercise Clause failed as a matter of law. [Doc. # 34 at 15-29]. In turn, this undermined Trinity's Equal Protection claim because, under *Locke*, absent a Free Exercise violation, only rational-basis review applied to this claim. [Doc. # 34 at 30]; *see also Locke*, 540 U.S. at 720 n.3. Accepting as true all of the allegations in Trinity's Complaint, it was clear that the decision to deny Trinity's grant application withstood this standard of review. *See* [Doc. # 34 at 30-31]. The Court then concluded that Trinity had not identified any valid legal theory that might entitle it to relief under either the Establishment or Free Speech Clauses of the First Amendment. [Doc. # 34 at 31-34]. In sum, contrary to Trinity's claim, the Court

did not find that Trinity would not succeed on the merits. Rather, the Court concluded that Trinity could not succeed on the merits, regardless of what evidence might be adduced through discovery, because its legal theories either did not exist or were contrary to established law.

Trinity's continued reliance on *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *St. Louis Univ. v. Masonic Temple Ass'n of St. Louis*, 220 S.W.3d 721 (Mo. 2007) does not justify reconsideration. With respect to the former, the Court found that *Church of the Lukumi* was wholly inapplicable to the facts of this case, for the same reasons articulated by the Supreme Court in *Locke*. *See* [Doc. # 34 at 14-15, 17]; *see also Locke*, 540 U.S. at 720. Regarding *St. Louis University*, the Court discussed at length the numerous factual circumstances that rendered that case distinguishable from the present one. *See* [Doc. # 34 at 9-12]. This did not, as Trinity contends, amount to an evaluation of the evidence, but rather a legal conclusion regarding the relevance of this opinion to the allegations in Trinity's Complaint. The Court further found that Trinity had misrepresented the holding in *St. Louis University*, [Doc. # 34 at 9], and ultimately concluded that this case did not support Trinity's position, [Doc. # 34 at 10-11]. Yet, Trinity continues to read between the lines of that opinion in an effort to craft a rule the Missouri Supreme Court simply did not adopt. Trinity merely rehashes arguments already raised and for the reasons set forth in the prior order, there is nothing in *St. Louis*

University that suggests additional discovery is necessary in this case.

Finally, Trinity takes out of context the Court's statement that "Trinity has failed to identify any evidence that might support its claim." [Doc. # 34 at 13]. The issue here was not whether Trinity had actually presented evidence to support its claims, but rather the fact that Trinity had failed to identify any evidence that, even in theory, might be revealed through discovery and would give rise to an actionable claim. At oral argument, Trinity could not identify what sort of evidence it hoped to discover and, more importantly, was unable to connect this evidence to any established legal theory that would entitle it to relief.

B. Leave to File an Amended Complaint

Trinity also seeks leave to file an amended complaint to add the additional factual allegation that Missouri has previously awarded tire scrap grants to religious organizations. Trinity does not, however, provide any explanation as to why it waited until after the Court dismissed this action to present this new allegation. In fact, Trinity states that Missouri "disclosed during discovery" that this had occurred, [Doc. # 36 at 3], which suggests that Trinity knew of this information before the case was dismissed, but nonetheless waited until after the adverse decision to attempt to add this claim. After a final judgment has been entered, "interests of finality dictate that leave to amend should be less freely available." *U.S. ex rel. Roop v. Hypoguard*

USA, Inc., 559 F.3d 818, 823 (8th Cir. 2009). Consequently, leave to amend may be denied where the plaintiff fails "to provide any valid reason for failing to amend" prior to the adverse judgment. *Id.* at 823-24 (quoting *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550-51 (8th Cir. 1997)). Accordingly, Trinity's failure to provide any explanation for not amending its Complaint prior to the dismissal of this action counsels against permitting the post-dismissal amendment.

Furthermore, the proposed amendment is futile. "Futility is a valid basis for denying leave to amend." *Id.* at 822. Trinity argues that this new allegation is necessary because it undermines Missouri's purported compelling interest in denying Trinity's grant application. As discussed above and in greater detail in the prior order, however, Trinity has failed to identify any valid legal theory under which Missouri would need to show the existence of a compelling interest in order to justify the decision not to award a grant to Trinity. Accordingly, even with this additional allegation, Trinity's Complaint would be subject to dismissal for failing to state a claim.

III. Conclusion

For the foregoing reasons, Trinity's motion to reconsider and for leave to file an amended complaint, [Doc. # 36], is DENIED.

NANETTE K. LAUGHREY
United States District Judge

Dated:_____
Jefferson City, Missouri

U.S. Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Missouri Constitution Article 1 § 7

Public aid for religious purposes – preferences and discriminations on religious grounds

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

Missouri Statute 260.273.
Fee, sale of new tires, amount
– collection, use of moneys – termination

1. Any person purchasing a new tire may present to the seller the used tire or remains of such used tire for which the new tire purchased is to replace.

2. A fee for each new tire sold at retail shall be imposed on any person engaging in the business of making retail sales of new tires within this state. The fee shall be charged by the retailer to the person who purchases a tire for use and not for resale. Such fee shall be imposed at the rate of fifty cents for each new tire sold. Such fee shall be added to the total cost to the purchaser at retail after all applicable sales taxes on the tires have been computed. The fee imposed, less six percent of fees collected, which shall be retained by the tire retailer as collection costs, shall be paid to the department of revenue in the form and manner required by the department of revenue and shall include the total number of new tires sold during the preceding month. The department of revenue shall promulgate rules and regulations necessary to administer the fee collection and enforcement. The terms "sold at retail" and "retail sales" do not include the sale of new tires to a person solely for the purpose of resale, if the subsequent retail sale in this state is to the ultimate consumer and is subject to the fee.

3. The department of revenue shall administer, collect and enforce the fee authorized pursuant to this section pursuant to the same procedures used in

the administration, collection and enforcement of the general state sales and use tax imposed pursuant to chapter 144 except as provided in this section. The proceeds of the new tire fee, less four percent of the proceeds, which shall be retained by the department of revenue as collection costs, shall be transferred by the department of revenue into an appropriate subaccount of the solid waste management fund, created pursuant to section 260.330.

4. Up to five percent of the revenue available may be allocated, upon appropriation, to the department of natural resources to be used cooperatively with the department of elementary and secondary education for the purposes of developing environmental educational materials, programs, and curriculum that assist in the department's implementation of sections 260.200 to 260.345.

5. Up to fifty percent of the moneys received pursuant to this section may, upon appropriation, be used to administer the programs imposed by this section. Up to forty-five percent of the moneys received under this section may, upon appropriation, be used for the grants authorized in subdivision (2) of subsection 6 of this section. All remaining moneys shall be allocated, upon appropriation, for the projects authorized in section 260.276, except that any unencumbered moneys may be used for public health, environmental, and safety projects in response to environmental or public health emergencies and threats as determined by the director.

6. The department shall promulgate, by rule, a statewide plan for the use of moneys received pursuant to this section to accomplish the following:

(1) Removal of scrap tires from illegal tire dumps;

(2) Providing grants to persons that will use products derived from scrap tires, or use scrap tires as a fuel or fuel supplement; and

(3) Resource recovery activities conducted by the department pursuant to section 260.276.

7. The fee imposed in subsection 2 of this section shall begin the first day of the month which falls at least thirty days but no more than sixty days immediately following August 28, 2005, and shall terminate January, 2020.

Rules of Missouri

Department of Natural Resources

Division 80 – Solid Waste Management

Chapter 9 – Solid Waste Management Fund

10 CSR 80-9.030 Scrap Tire Grants

PURPOSE: This rule provides a statewide plan for the use of moneys received under section 260.273, RSMo.

(1) Statewide Plan.

(A) General. In combination with 10 CSR 80-9.035 Scrap Tire Cleanup Contracts, this is a statewide plan to implement section 260.273, RSMo.

(B) Goals. The goals of the statewide plan are to reduce the number of scrap tires produced and encourage sustainable scrap tire markets for reuse, remanufacturing and reprocessing of scrap tires; divert the stream of scrap tires from being landfilled or illegally dumped; and mitigate the adverse public health, welfare and environmental impacts of illegal scrap tire sites.

(2) Grant Types. The department may provide grants not to exceed five percent (5%) of the moneys received under section 260.273, RSMo, for the following grant types subject to financial resources, appropriations, eligibility requirements and application priorities:

(A) Demonstration grants may be available to pay testing costs required to demonstrate the technical and economic feasibility of utilizing scrap tire materials in the manufacture of a product or as tire-derived fuel or a fuel supplement. Grants may also be available for end use as shock absorbing scrap tire play- ground or running track material;

1. Grant amount. The department will award grants in an amount determined by the department on an annual basis.

2. Matching share. The grantee's matching share of the total cost of the activity shall be at least fifty percent (50%) of the grant award and shall be a cash contribution toward the project. A match may be required up to fifty percent (50%) for grants utilizing shock absorbing scrap tire playground or running track material; and

(B) Capital expenditure grants may be available for equipment to convert/modify existing facilities for the purpose of using scrap tires as a fuel or fuel supplement; or for equipment to convert or modify existing facilities to manufacture products made from scrap tires.

1. Grant amount. The department will award grants in an amount determined by the department on an annual basis.

2. Matching share. The grantee's matching share of the total cost of the activity shall be up to

fifty percent (50%) of the grant award and shall be a cash contribution toward the project.

(3) Eligibility.

(A) This rule applies to any person located in Missouri involved in any activity funded under section (2) of this rule.

(B) Applications for activities that, in the department's professional judgment, would cause a public nuisance or environmental, safety or health hazards, will be disqualified.

(C) Grants will only be awarded for an activity which uses at least forty percent (40%) of its tires from Missouri scrap tire sites, retailers processors or residents. The burden of proof shall be on the applicant to show that the eligibility requirements have been met.

(D) Grants will not be awarded to activities for projects that result in the landfilling of scrap tires.

(4) Application Requirements for Grants.

(A) An applicant shall submit a completed application on forms provided by the department. The application must include all required documentation to be complete.

(B) Applications must be received by the deadline established by the department to be eligible for funding.

(C) Applicants shall prove to the department's satisfaction that the use being pro- posed is an eligible use as described in sections (3) and (4) of this rule.

(5) Application Review and Evaluation. Applications will be reviewed for completeness and ranked according to the evaluation criteria established by the department with the advice of the Scrap Tire Advisory Group and in light of the goals as set forth in subsection (1)(B) of this rule.

(6) Grant Awards.

(A) Prior to award of funding, the recipient shall:

1. Provide verification to the department that all applicable federal, state and local permits, approvals, licenses or waivers required by law to implement the activity have been obtained or applied for; and

2. Enter into a grant award agreement issued by the department.

(B) Funds awarded by the department must be disbursed in accordance with the department's general terms and conditions, special terms and conditions (if applicable), grant award and contracts.

(7) Costs and Record Keeping.

(A) Eligible costs for demonstration grants are:

1. Air emissions test costs;

2. Salaries and fringe benefit costs of personnel directly engaged in the activity;

3. Drafting, printing and distributing of final reports;

4. Supplies needed and used during the project;

5. Eligibility costs for utilization of playground or running track material are limited to the material itself and any associated delivery costs; and

6. Consultant costs.

(B) Eligible costs for capital expenditure grants are the cost of equipment, cost to convert equipment or modify existing facilities for the purpose of using scrap tires as a fuel supplement or the cost of equipment to convert or modify existing facilities to manufacture products made from scrap tires.

(C) Ineligible Costs. Demonstration and capital expenditure grants shall not include the following costs:

1. Costs for which payment has been or will be received under another federal, state or local financial assistance program;

2. Project costs incurred prior to or after the grant period;

3. Fines and penalties due to violations or failure to comply with federal, state or local laws or regulations;

4. Ordinary operating expenses of local, county and elected government, such as salaries and expenses that are not directly related to the activity;

5. Acquisition or leasing of real property; and

6. Taxes, vehicle registration, legal and contingency costs.

(D) Grant Payment.

1. Initial payment. After the grant has been approved by the department, reimbursement payments will be made on a quarterly basis, for up to seventy-five percent (75%) of the total amount of the award upon submission of complete payment requests and corresponding quarterly reports.

2. Final payment. The final twenty-five percent (25%) of the grant shall be paid to the recipient only upon approval of the final report and the final accounting of the activity's expenditures. The recipient shall submit the final payment request within sixty (60) days after project completion or at the end of the grant period. The department cannot guarantee funding of an approved activity after the close of the fiscal year in which the activity was approved.

(E) Grant Interim and Final Reports. The reporting requirements shall be provided in the department's approved written grant agreement.

(F) Accountability

1. The recipient shall maintain an accounting system that accurately reflects all fiscal transactions, incorporates appropriate controls and safeguards, and provides a clear reference, particularly to source or original documents.

2. Financial schedules and statements filed with grant applications and payment requests shall be based on records which meet the following minimum requirements:

A. Grant accounts shall separate receipts and eligible expenditures from those allocable to other programs and activities;

B. Receipts and expenditures shall be listed in sufficient detail to provide a basis for accurate and complete program reporting;

C. All activity receipts shall be identified in sufficient detail to reflect their source and purpose;

D. Supporting records for all activity expenditures shall be itemized in detail to indicate the nature and appropriateness of each. As proof of payment, cancelled checks or receipts from vendors shall be maintained;

E. All contractual services shall be verified by a formal written contract or agreement specifying financial terms, contract duration and services to be rendered;

F. The recipient shall retain all records relating to the grant activity and make them available to the department for inspection from the date of submission until three (3) years after the grant period ends;

G. If any litigation, claim, negotiation, audit or other action involving the records relating to the grant activity has been started before the expiration of the three (3)-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the initial three (3)-year period, whichever is later;

H. All general and special terms and conditions of the department applicable to the activity will be applicable to recipients of awards made available by this chapter; and

I. Persons eligible to receive grants through this rule shall comply with the department's reporting requirements, grant award agreements and contracts, general and special terms and conditions, as well as any applicable federal, state and local permits, approvals, licenses or waivers necessary to implement the activity.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.	)	
Plaintiff,	)	
v.	)	Case No. _____
SARA PARKER PAULEY, in her Official capacity as Director of The Missouri Department of Natural Resources Solid Waste Management Program,	)	
Defendant.	)	

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW the plaintiff, by counsel and pursuant to the Federal Rules of Civil Procedure, and for its causes of action against Defendant, alleges and states the following:

I. INTRODUCTION

1. Plaintiff brings this action pursuant to 42 U.S.C. § 1983 for violation of its civil rights. TRINITY LUTHERAN CHURCH OF COLUMBIA, INC., ("Church") runs a learning center called the Trinity Lutheran Church Child Learning Center ("Learning Center"). Through the Learning Center, the Church sought a grant from the Missouri Department of Natural Resources Solid Waste Management Program ("Department") to participate in the 2012 Playground Scrap Tire Surface Material Grant Program ("Scrap Tire Program"). Although the Learning Center's application scored fifth out of forty-four applications, it was denied participation in the Scrap Tire Program solely because the Learning Center is a part of a church. Prohibiting the Learning Center from participating in the Scrap Tire Program because it is a part of a church violates Plaintiff s rights to equal protection, free exercise of religion and free speech under the First and Fourteenth Amendments to the United States Constitution, the First Amendment's Establishment Clause and the Missouri Constitution Article 1, § 7.

2. The Church desires to participate in the Scrap Tire Program in the future without discrimination. It seeks declaratory and injunctive relief to redress irreparable harm to its civil rights.

II.
JURISDICTION AND VENUE

3. This action raises federal questions under the United States Constitution, particularly the First

and Fourteenth Amendments, and questions of state law under the Missouri Constitution Article 1, § 7.

4. This Court has original jurisdiction over the federal claims by operation of 28 U.S.C. §§ 1331 and 1343 and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 to hear claims under the State Constitution.

5. This Court has authority to grant the requested injunctive relief under 28 U.S.C. §1343(3); declaratory relief under 28 U.S.C. §2201(a) and attorneys' fees under 42 U.S.C. §1988(b).

6. Venue is proper in this Court under 28 U.S.C. § 1391(b), as a substantial part of the events or omissions giving rise to the claims occurred in this District.

III.
IDENTIFICATION OF PLAINTIFF

7. Plaintiff TRINITY LUTHERAN CHURCH OF COLUMBIA, INC. is a non-profit corporation that runs the Learning Center. The Learning Center was incorporated in 1980 as a non-profit charitable corporation in Missouri, and then merged with Trinity Lutheran Church in 1985.

IV.
IDENTIFICATION OF DEFENDANT

8. Defendant SARA PARKER PAULEY is the Director of the Missouri Department of Natural

Resources Solid Waste Management Program, and is sued only in her official capacity. The Director oversees the Scrap Tire Program and has authority to implement the requested injunctive relief sought in this matter. *See* V.A.M.S. Const. Art. 4, § 47.

V.
STATEMENT OF FACTS

9. The Church, through the Learning Center, runs a pre-school at 2201 West Rollins Road, in Columbia, Missouri.

10. The Learning Center was established as a not-for-profit organization in 1980 with the mission of providing quality pre-school education and day care for families in the Boone County, Missouri and surrounding areas.

11. In 1985, the Learning Center merged with Trinity Lutheran Church, and remains in this status.

12. The Learning Center is licensed by the Missouri Department of Health and Senior Services, Bureau of Child Care Safety and Licensing and is in the process of gaining accreditation as an early childhood education program.

13. Enrollment at the Learning Center averages 90 children ages two to kindergarten. The Learning Center is open year round and services working families and parents attending school throughout

the City of Columbia, Boone County, and other adjacent counties.

14. The Learning Center is a ministry of the Church and incorporates daily religion and developmentally appropriate activities into a school and optional daycare program.

15. Through the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of Boone County and the surrounding area.

16. The Learning Center provides a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.

17. The Church has a sincere religious belief to be associated with the Learning Center and to use it to teach the Gospel to children of its members, as well to bring the Gospel message to non-members.

18. The enrollment policy of the Learning Center is to provide equal opportunity for students. The Learning Center admits students of any sex, race, color, religion, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Learning Center.

19. The Learning Center provides a playground for its students. But the surface of the playground consisted of pea gravel and grass.

20. The Learning Center sought to improve the safety of the surface area of the playground by participating in the Scrap Tire Program.

21. The Scrap Tire Program, run by the Department, provides grants to qualifying organizations to use recycled tires for playgrounds.

22. This program not only allows grant recipients to provide safe surfacing for playgrounds, but encourages the use of re-cycled tires, thus reducing the landfills and benefiting the environment.

23. Nonprofit day care centers and other nonprofit entities are eligible to submit grant applications.

24. The Church, through the Learning Center, sought to participate in the 2012 Scrap Tire Program to remove and replace the large portion of the pea gravel surfacing on its playgrounds with a recycled pour-in-place rubberized product.

25. But the Department has a policy that prohibits organizations from participating in the Scrap Tire Program if the applicant is owned or controlled by a church, sect, or denomination of religions, if the grant would directly aid any church, sect or denomination of religion, if the applicant's

mission is not secular in nature, or if the grant would not be used for secular purposes. *See* Scrap Tire Program grant application, attached to the complaint as Exhibit A.

26. Phil Glenn, a representative of the Church, contacted Kim Tschirgi, a planner for the Department, concerning this prohibition. Ms. Tschirgi informed Mr. Glenn that the Department did not refuse applications from any organizations.

27. Ms. Tschirgi clarified that if the organization scored high enough on the application to otherwise qualify for a grant, the application might have to be forwarded to the Department's legal office for review to determine eligibility.

28. The Church, through the Learning Center, then applied for a grant from the Department through its 2012 Scrap Tire Program. The grant is attached to the Complaint as Exhibit B.

29. The grant applications for the 2012 Scrap Tire Program were graded by the Department.

30. The applications are graded because there is a limited amount of money to disburse through the grant. By grading the applications, the Department ensures that the organizations that will best serve the purposes of the grant will receive the grant.

31. The Church's grant application received 640 total points, and ranked fifth out of 44 applications.

32. According to the Department, fourteen grant projects were funded in 2012. *See* Exhibit C, attached to the complaint (May 23, 2012 email from Kim Tschirgi, Planner for the Solid Waste management Program to Mr. Glenn). The Department denied the Church's grant.

33. In a letter from Chris Nagel, the Director of the Solid Waste Management Program, dated May 21, 2012, the Department stated,

> Thank you for the time and effort you have taken to respond to the Missouri Department of Natural Resource's recent offering of financial assistance through the 2012 Playground Scrap Tire Surface Material Grants. The department appreciates your candor in explaining how the former "Trinity Lutheran Child Learning Center" was merged into the surviving corporation "Trinity Lutheran Church of Columbia, Missouri, Inc." back in the 1980s. However, after further review of applicable constitutional limitations, the department is unable to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article I, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."

See Exhibit D attached to the complaint (May 21, 2012 letter from Chris Nagel to Gail Schuster, Director of the Trinity Lutheran Church Child Learning Center).

34. Article 1, Section 7 of the Missouri Constitution states,

> That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.

See V.A.M.S. Const. Art. 1, § 7 ("Missouri's Blaine Amendment").

35. The sole reason the Church's grant was denied was because it was a church.

36. The Church desires to participate in future grants from the Missouri Department of Natural Resources, including future Scrap Tire Programs.

37. The Learning Center has additional playgrounds on its facilities that are in need of safer surfacing.

38. Through the Learning Center, the Church desires to apply for future grants from the Scrap

Tire Programs to be able to acquire re-cycled tires to resurface its playgrounds.

39. Due to the Department's actions and policies described above, including its unconstitutional application of the Missouri Blaine Amendment in denying the Plaintiff's grant application, the Learning Center cannot receive future grants.

VI.
STATEMENT OF LAW

40. Each and all of the acts herein alleged of the Department, its officers, agents, servants, employees, or persons acting at its behest or direction, were done and are continuing to be done under the color of state law, including the statutes, regulations, customs, policies, and usages of the State of Missouri.

41. Defendant prohibited Plaintiff from receiving a grant because the Learning Center is connected to a church, pursuant to the Department's customs, policies and practices, including its unconstitutional application of Missouri's Blaine Amendment.

42. Defendant's decision to deny Plaintiff access to the Scrap Tire Program is a direct result of the policies, practices, customs, and usages officially adopted and promulgated by Department.

43. As a direct result of the Defendant's violation of Plaintiff's constitutional rights, as

alleged below, Plaintiff is unable to participate in a government program without violating its religious beliefs and practices, resulting in irreparable harm for which there is no adequate remedy at law.

44. Defendant is treating Plaintiff differently than other grant applicants because it is a church.

45. Plaintiff's religious exercise is fully protected by the United States Constitution.

46. Plaintiff's right to be treated similarly to non-religious grant applicants is fully protected by the United States Constitution.

47. Prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church is a violation of the First Amendment and Fourteenth Amendment to the United States Constitution.

48. Unless and until the Defendant's exclusion of the Plaintiff from the Scrap Tire Program is enjoined, the Plaintiff will suffer and continue to suffer irreparable harm to its constitutional rights.

49. Providing grant monies to Plaintiff for the purpose of purchasing recycled tires for a playground does not impermissibly aid any church, sect or denomination of religion in violation of Missouri's Blaine Amendment.

50. Prohibiting Plaintiff from participating in the Tire Scrap Program because it is a church

violates the Blaine Amendment as it discriminates against the Plaintiff because it is a church.

VII.
FIRST CAUSE OF ACTION: VIOLATION OF THE RIGHT TO EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION

51. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

52. Defendant has allowed other similarly-situated non-profit organizations to participate in the Scrap Tire Program, including other learning centers and day care organizations such as Jefferson City Day Care Center, Inc.

53. The Equal Protection Clause requires that the government treat equally all persons similarly situated.

54. Defendant denied Plaintiff access to the Scrap Tire Program solely because the Learning Center is connected with a church.

55. Religion is a suspect class.

56. In order for the Department to treat Plaintiff dissimilarly with other like organizations, it must have a compelling reason and such treatment must be the least restrictive means of achieving that interest.

57. Defendant does not have a compelling governmental interest to justify such disparate treatment of Plaintiff.

58. Excluding Plaintiff from the Scrap Tire Program is not narrowly tailored to achieve a compelling governmental interest.

59. Excluding Plaintiff from the Scrap Tire Program because the Learning Center is connected to a church is not rationally related to a legitimate governmental interest.

60. Defendant's actions in unconstitutionally enforcing the Missouri Blaine Amendment by denying Plaintiff's grant application targets religion for disparate treatment as compared to secular applicants.

61. Defendant's actions and policies violate the Equal Protection Clause of the Fourteenth Amendment.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

VIII.
SECOND CAUSE OF ACTION: VIOLATION OF THE RIGHT TO FREE EXERCISE OF RELIGION UNDER THE UNITED STATES CONSTITUTION

62. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

63. The Church has a sincere religious belief to teach a Christian worldview to children through the Learning Center.

64. The Department's policies and actions require the Church to abandon its religious beliefs and practices in order to participate in the Scrap Tire Program.

65. Requiring the Church to choose between participating in a government program or forfeiting its religious beliefs and practices is a violation of the Free Exercise Clause of the United States Constitution.

66. Requiring the Church to choose between participating in a government program or forfeiting its religious beliefs and practices places a substantial burden on Plaintiff's religious exercise.

67. Defendant's actions in unconstitutionally enforcing the Missouri Blaine Amendment by denying Plaintiff's grant application because it is a church targets religious exercise.

68. The Department's policies and actions as described above are not neutral, nor generally applicable.

69. The Department's policies and actions as described above target religion for disparate treatment.

70. The Department's policies and actions do not serve a compelling governmental interest and are not narrowly tailored to achieve a valid governmental interest.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

IX.
THIRD CAUSE OF ACTION: VIOLATION OF THE ESTABLISHMENT CLAUSE UNDER THE UNITED STATES CONSTITUTION

71. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

72. The Department's policies and actions that prohibit organizations from participating in the Scrap Tire Program that are "owned or controlled by a church, sect, or denomination of religions" and where such grant would "directly aid any church, sect or denomination of religion" are hostile to religion.

73. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to

deny Plaintiff's grant application was hostile to religion.

74. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application did not serve a valid secular purpose.

75. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application has the primary effect of hostility to religion.

76. The Defendant's actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application excessively entangles the Department with religion as it has to determine what is religious enough to justify denial of a grant.

77. The Department's policies and actions in enforcing the Department's policies, including its unconstitutional application of the Missouri Blaine Amendment, to deny Plaintiff's grant application target religion for disparate treatment.

78. The Department's policies and actions, and the Defendant's enforcement of those policies, violate the Establishment Clause of the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

FOURTH CAUSE OF ACTION: VIOLATION OF THE FREE SPECCH CLAUSE UNDER THE UNITED STATES CONSTITUTION

79. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

80. The Church engages in speech and expressive activity by teaching a Christian worldview to children through the Learning Center.

81. The Church's speech is fully protected by the First Amendment to the United States Constitution.

82. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church restricts Plaintiff's speech based on its religious viewpoint and content.

83. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church singles out religious expression for discriminatory and unfavorable treatment.

84. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church restrains

constitutionally-protected speech in advance of its expression.

85. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church chills the Plaintiff's speech.

86. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church grants unfettered discretion to the Department officials in applying Missouri's Blaine Amendment. For example, Department officials have unfettered discretion to determine what type of grant to a church impermissibly aids the church.

87. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church burdens religious expression like that of Plaintiff's.

88. The Department has no compelling reason that would justify their restrictions on speech.

89. The Department has no rational basis that would justify their restrictions on speech.

90. The Department's policies and actions are not narrowly tailored to achieve any permissible governmental interest.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

FIFTH CAUSE OF ACTION:
VIOLATION OF THE MISSOURI BLAINE AMENDMENT, V.A.M.S., ART. 1, §7.

91. The allegations contained in paragraphs 1-50 are incorporated herein by reference.

92. Missouri's Blaine Amendment states that "no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." *See* V.A.M.S. Art. 1, § 7.

93. The Department's policies and actions in prohibiting Plaintiff from participating in the Scrap Tire Program because it is a church discriminates against Plaintiff because it is a church, in violation of Missouri's Blaine Amendment.

94. Providing grant monies to Plaintiff for the purpose of purchasing recycled tires for a playground does not impermissibly aid any church, sect or denomination of religion.

95. Prohibiting Plaintiff from participating in the Tire Scrap Program because it is a church violates the Blaine Amendment as it discriminates against the Plaintiff because it is a church.

WHEREFORE, Plaintiff respectfully prays that the Court grant the relief set forth in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray that this Honorable Court:

A. Enter a Declaratory Judgment stating that the Department's failure to approve the Church's 2012 Scrap Tire Application and its policies and actions in denying grants to applicants who are churches or connected to churches violate the Equal Protection, Free Exercise, Free Speech, and Establishment Clauses of the First and Fourteenth Amendments to the United States Constitution, as well as the Missouri Constitution, Article 1, § 7;

B. Enter a preliminary and permanent injunction enjoining the Defendant, her agents, servants, employees, officials or any other person acting in concert with her or on her behalf, from discriminating against the Church on future grant applications based upon the connection between the Church and the Learning Center, including applying the Blaine Amendment against the Church to deny it a grant for recycled tires because it is a church;

C. Declare that the Missouri Blaine Amendment was unconstitutional as applied to deny Plaintiff's 2012 grant application;

D. Award Plaintiff's costs and expenses of this Action, including a reasonable attorneys' fee award, in accordance with 42 U.S.C. § 1988, and other applicable state and federal law;

E. Grant such other and further relief as the Court deems equitable, just, and proper;

F. Adjudge, decree, and declare the rights and other legal relations of the parties to the subject matter here in controversy, in order that such declarations shall have the force and effect of final judgment; and

G. Retain jurisdiction of this matter for the purpose of enforcing the Court's orders.

Respectfully submitted this 25th day of January, 2013.

/s/ Joel L. Oster
Joel L. Oster
Missouri Bar # 50513
joster@alliancedefendingfreedom.org
Erik W. Stanley*
Kansas Bar # 24326
estanley@alliancedefendingfreedom.org
ALLIANCE DEFENDING FREEDOM
15192 Rosewood Street Leawood, Kansas 66224
(913) 685-8000
(913) 685-8001 fax

Michael K. Whitehead
Missouri Bar # 24997
THE WHITEHEAD LAW FIRM, LLC
1100 Main Street, Suite 2600
Kansas City, Missouri 64105
(816) 876-2600
(916) 221-8763 fax
mike@thewhiteheadfirm.org

ATTORNEYS FOR PLAINTIFF

**Pro hac vice to be submitted*

VERIFICATION OF COMPLAINT

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I have read the foregoing Verified Complaint and the factual allegations thereof and that to the best of my knowledge the facts alleged therein are true and correct.

Executed this 24th day of January, 2013.

/s/ Mike Walz

Mike Walz, President

/s/ Deborah K. Antel

Deborah K. Antel, Secretary

PLAYGROUND SCRAP TIRE SURFACE MATERIAL GRANT APPLICATION FORM[1]

Missouri Department of Natural Resources
Solid Waste Management Program

Legal Name of Organization: Trinity Lutheran Church Child Learning Center
Address: 2201 West Rollins Road; Columbia, MO 65203
Telephone Number: 573-445-1014
Fax Number: 573-445-5878
Federal Tax ID Number: 23-7426726

APPLICANT PROFILE

Type of Applicant: (indicated) Non-Profit entity (attach legal status documentation)
Name of Authorized Official: Ms. Gail Schuster
Official Title: Director
Mailing Address: 2201 West Rollins Road; Columbia, MO 65203
Telephone Number: 573-445-1014
Fax Number: 573-445-58780
Email Address: glennhaven@ktis.net

LOCATION PROFILE - *Location of the project site and status of property (i.e. owned, leased, being*

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[1] The Appendix contains the substance of the application submitted by the Petitioner but the formatting has been revised to comply with this Court's font and page formatting rules. The grant application in its original formatting is part of the record below in this case.

purchased; attach proof of ownership or written permission from property owner.)

Property is located at 2201 West Rollins Road, Columbia, Missouri and is owned by Trinity Lutheran Church of Columbia, Inc. Letter granting permission for this project and clarifying ownership is at Attachment A to this application.

Solid Waste Management Region: Region H - Mid-Missouri Solid Waste Management District

County: Boone

PROJECT DESCRIPTION - *Describe the proposed project and its objectives. Explain why there is a need for the project and its current status. Describe the number of people served by the project and the approximate geographic area of Missouri that will benefit from the project.*

See Attachment B

MATERIAL SUMMARY - *Provide written documentation (scrap tire material vendor quotes) regarding the quality, quantity, cost and availability of your source of scrap tire material. Documentation should include the quantity required for your project, an estimated cost for the material for your project, an estimate of the cost of delivery of the material and the percentage of Missouri generated tires used in the material.*

See Attachment C

SOLID WASTE MANAGEMENT REGION COOPERATIVE EFFORT - *Describe in detail the Solid Waste management Region's involvement in the project.*

The Mid-Missouri Solid Waste Management District's Executive Board supports the objectives of this project (see Attachment D). They believe the successful completion of this project will help promote awareness of the availability and marketability of recycled rubber tire products. In addition, the City of Columbia Solid Waste Department endorses this project (see Attachment E).

MEDIA EXPOSURE - *Provide a plan to seek media exposure for this project (guidelines provided in the application instructions).*

The child Learning Center will implement an aggressive community awareness program to publicize this project. After the completion of the project, we plan to conduct a ribbon-cutting ceremony with invitations to various community group leaders and City of Columbia leaders. This opening ceremony will publicize the benefits of using recycled materials, especially discarded used automobile tires, to improve our environment. In addition, The Center will utilize the monthly newsletter, social networking sites, website and local media press releases to inform the community of the project. The Center will contact local television and radio stations for potential news reports on the project. Local print media such as newspapers and

local magazines will be contacted with press releases and ideas for possible news stories on the project. See Attachment G, Information Plan.

RECYCLING EDUCATION – *Provide a plan to use the project as part of a recycling program to teach students or children the benefits of recycling.*

Children who attend The Learning Center are encouraged to recycle as part of the school curriculum. See Attachment F for lesson plan. This project will provide an excellent learning environment for teaching the children the advantages of recycling discarded products. The children and parents will experience firsthand how recycled rubber products can enhance safety and the environment. Through the use of the information plan, parents and members of the community will be educated on the benefits of recycling. This project will go hand-in-hand with The Center's existing policy of recycling aluminum cans, plastic, electronic equipment, office equipment, and paper products.

INFORMATION PLAN – *Provide a plan for sending grant information to others (guidelines provided in application instructions).*

See Attachment G

SCOPE OF WORK – *Identify project tasks by number and describe each task in not more than one paragraph. Project tasks are the actions taken to achieve specified project objectives. Identify which personnel are responsible for each task.*

See Attachment H

TIMELINE GRAPH – *The Scope of Work tasks must be the items on the vertical axis of the timeline graph. Quarterly progress reports are mandatory and shall be submitted after the third, sixth, ninth, and twelfth month of the project period. The project period will be stated on the Financial Assistance Agreement of the grant. Due to the variable nature of the financial assistance negotiation process, it is not possible to predict the project start date. For this reason, the months on the timeline are referred to as numbers 1-13, not as January, February, etc.*

See Attachment I

BUDGET – *Complete the budget below showing the total cost of the proposed playground scrap tire surface material project. Grant funds are eligible for surface material and delivery costs only. Site preparation, material containment/support, labor, etc. are costs not eligible for grant fund reimbursement.*

Provide a copy of scrap tire material vendor quotes supporting the budget figures included below. Fifteen scoring points are awarded if 3 or more quotes are provided.

Preference will be given to applicants requesting mats or pour-in-place surface materials. Grant recipients requesting mats or pour-in-place surface material will be eligible for a grant award up to $20,000 while

those requesting loose surface material will be eligible for a grant award up to $10,000.

Note: The budget summary will be used as the basis for the grant agreement and reflects the maximum amount for which the recipient may be eligible for reimbursement. If an applicant receives a grant award based upon additional scoring of points due to the recipient's intent to purchase additional surface material, the recipient will only be eligible to receive reimbursement based on the percentage of the actual project cost.

Budget Summary:

Requested Grant Funds:	
Scrap Tire Material.....	$20,000
Additional Surface Material Funds:	
Scrap Tire Material.....	$10,080
Delivery.....	$ 500
Total Project Cost (surface material only).....	$30,580

SUPPORTING DOCUMENTS – - Preliminary Project Design - *Provide a diagram of the area where the scrap tire surface material will be used. Include dimensions of the area and type of material to be utilized. Loose surface material must by 8" depth to ensure fall safety, wire free and properly contained. Mats and pour-in-place surface material must be*

placed on asphalt, concrete, or other suitable surface(s). Provide information on both the surface material and containment (loose fill) or support (mats, tiles, pour-in-place) material to be used. All surface material projects must conform to the manufacturer's specifications.

See attachment J

APPLICATION CHECKLIST – *Before submitting your application, please complete this checklist. Only if the applicant can answer Yes to all questions on this form should the application be submitted. Evidence substantiating each "Yes" answer in the checklist must be included in the application and be referenced on the checklist.*

1. *Is the certification statement below signed and dated by the authorized official?* Yes – Attachment A

2. *Are an original and two copies of the application submitted?* Yes

3. *Is the project located in Missouri?* Yes; Attachment A

4. *Is the applicant profile complete?* Yes; Page 1

5. *Is the location profile complete?* Yes; Page 1

6. *Is the project description complete?* Yes; Attachment B

7. *Is the material summary complete?* Yes; Attachment C

8. *Is the media exposure complete?* Yes; Page 2

9. *Is the recycling education complete?* Yes; Attachment F

10. *Is the information plan complete?* Yes; Attachment G

11. *Is the Solid Waste Management Region cooperative effort complete?* Yes; Attachment D

12. *Is the scope of work complete?* Yes; Attachment H

13. *Is the time line graph complete and in the proper format?* Yes; Attachment I

14. *Is the budget complete?* Yes; Page 4

15. *Is support documentation as required provided?* Yes; Attachment J

16. *Is the amount of assistance requested $20,000 or less for mats or pour-in-place surface material, or $10,000 or less for loose surface material?* Yes

I hereby certify that the information in this application is true and correct. I further certify that the organization that I represent has sufficient resources to conduct this project while awaiting reimbursement from the department. Further, I certify compliance with the following criteria:

1. The application is not owned or controlled by a church, sect, or denomination of religions and the grant would not directly aid any church, sect or denomination of religion.

2. The applicant's mission and activities are secular (separate from religion; not spiritual) in nature.

3. The grant will be used for secular (separate from religion; not spiritual) purposes rather than for sectarian (Denominational, devoted to a sect) purposes.

SIGNATURE OF AUTHORIZED OFFICIAL / DATE
SIGNATURE OF PROJECT MANAGER / DATE

ATTACHMENT A
LETTER OF OWNERSHIP AND APPROVAL OF PROJECT

TRINITY LUTHERAN CHURCH
<Letterhead>

Missouri Department of Natural Resources
Solid Waste Management Program
P.O. Box 176
Jefferson City, MO 65102-0176

Subject: Grant Application – Trinity Lutheran Child Learning Center

To Whom It May Concern:

In support of The Trinity Lutheran Child Learning Center (TLCLC) grant application for the Missouri Department of Natural Resources Playground Scrap Tire Surface Material Grant program, this letter provides: 1) proof of ownership of The TLCLC; and 2) owner approval to install a recycled rubber product on the church property.

The TLCLC was established as a separate corporate entity in 1980 and eventually merged with Trinity Lutheran Church of Columbia, Incorporated in 1985 (Attachment 1) and therefore TLCLC is an entity under the auspices of Trinity Lutheran Church of Columbia, Inc. and located on church property.

The TLCLC is a not-for-profit organization under the corporate church not-for-profit status (See

Attachment 2). It is a ministry to Columbia, Boone County and surrounding counties and community residents and admits students of any sex, race, color. national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the Learning Center. It does not discriminate on the basis of sex, race, color, national and ethnic origin in administration of its educational policies and other school administered programs nor does it require any statement of faith as a requirement for admission.

The Trinity Lutheran Church of Columbia, Inc. Board of Directors has reviewed the TLCLC plan for installing a recycled tire resilient rubber product on the school playground and approves the installation on church property.

Sincerely,

Mike Walz
<signature block>

2 Attachments:
A-1. Corporate merger document
A-2. Not-for-profit designation

ATTACHMENT B
PROJECT DESCRIPTION

The Trinity Lutheran Child Learning Center (TLCLC) was established as a not-for-profit organization in 1980 with the mission of providing quality pre-school education and day care for families in the Boone County and surrounding areas. In 1985, TLCLC was merged with Trinity Lutheran Church of Columbia, Inc. and remains in this status. The Center is licensed by the Missouri Department of Health and Senior Services, Bureau of Child Care Safety and Licensing and is in the process of gaining accreditation as an early childhood education program. The upgrade of the TLCLC playground is an integral part of supporting documentation for the accreditation process. TLCLC also participates in the Federal Child and Adult Care Food program. Enrollment at The Center averages 90 children ages 2 up to kindergarten. The Center is open year round and services working families and parents attending school throughout The City of Columbia, Boone County and other adjacent counties. The mission of The Center is to provide a safe, clean, and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, physically, socially, and cognitively.

The enrollment policy of the TLCLC is as follows: "Equal Opportunity for Students: Trinity Lutheran Child Learning Center admits students of any sex, race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at

the Learning Center. It does not discriminate on the basis of sex, race, color, national and ethnic origin in administration of its educational policies and other school administered programs."

TLCLC has one moderately sized playground that is subdivided into two areas (see Attachment 3): an area for younger children up to ages 2 ½ to 4 years (averaging approximately 25 children during play periods) and another larger area for the older children through pre-kindergarten age (averaging approximately 30-40 children during play periods). Each area also includes a large covered pavilion that houses sandbox play areas. The two areas have a number of different playground equipment systems appropriate to the age of the child. The surfacing in both areas, other than the sand box pavilions, is pea gravel with some other areas of grass which will not be replaced. The pea gravel surface continually migrates away from critical play areas, especially under the swing sets and slide units and climbing units. TLCLC has placed rubber mats in critical areas but the pea gravel continually erodes from under the mats and creates a trip hazard. The pea gravel is unforgiving if/when a child falls and thereby poses a basic safety hazard.

The TLCLC proposed project will remove and replace an older climbing/swing structure with a safer, newer technology unit and will remove and replace a large portion of the pea gravel surfacing with a recycled pour-in- place rubberized product (with the assistance of the DNR grant program). The TLCLC will contribute 30% toward the resurfacing

portion of the project and will provide self-help labor to prepare the site for the new surfacing material in accordance with the installation contractor and rubber product manufacturer requirements.

The benefits to this project are to increase access to the playground to all children, regardless of ability, by providing American with Disabilities Act (ADA)-compliant surfacing and to provide long-term, safe, resilient surfacing under the playground equipment and other play areas. A very important side benefit from this proposed project is the use of Missouri recycled automobile tires for the resilient surfacing material which is a positive use of a recycled product to improve our Missouri environment.

This proposed project will be cost effective for the long term and provide a much safer environment for not only The Center students but the surrounding community as local children frequently use the playground during non- school hours and nights and weekends. In addition, Trinity provides facilities for a kindergarten through eighth grade elementary school and children from that school often utilize the playground after hours.

ATTACHMENT C
VENDOR QUOTES

Quote 1:

From: "BertDarling"bdarling@roosterrubber.com
Date: 01/13/2012 1:04PM
To: <glennhaven@ktis.net>
Subject: Rooster Rubber Premium Rubber Mulch

Phil;

Thank you for visiting our website and your inquiry regarding Rooster Rubber's Premium Rubber Mulch and playground surfacing for your grant application.

Please let me know;
The square foot area you would like to cover; See below
Color desired; Black and 1 color
Quote;
Section 1 ; 6504 051 sq/ft @ $13.55/sq ft = $8,8130 0
Section 2; 491.519 sq/ft @ $13.55/sq f t = $6,660 00
Section 3 ; 1,6700 933 sq/ft @ $15.00/sq ft = $25,051.4 0
Plus applicable taxes.
Freight estimate; Included
Availability; In stock
Site Preparation: Not Included
Installation; Sub-surface and EPDMs surface only, cleanup
Swing/Slide Black Rubber Mats;
2' x2' x 5/8" or 2' x3' x 5/8"; $52.00/each
4'x4'x 5/8" or 4'x6'x 5/8"; $

Borders (4' long x 12" tall x 4" wide); Not included
Percentage of Missouri tires used in our products; 100% of Black EPDM (Documentation available upon request)

I look forward to hearing from you.

NEVER MULCH AGAIN!!!!

Bert Darling
Rooster Rubber, LLC
(816) 241-6400
bdarling@RoosterRubber.com

Quote 2:

S. Bollinger & Associates, LLC
Safety surfacing
P.O. Box 856
Hillsboro, MO 63050

January 17, 2012

Trinity Lutheran Church

RE: Playground Surfacing

Attention: Phil Glenn

Per your email request dated 1-12-12 we are proposing to furnish all labor and material necessary to install pour-in-place playground surfacing in your

existing playgrounds with the following qualifications.

Three areas – totaling 2,811 sq. ft.
Sub-base by others
Thickness – 2"
Color – 50% color/50% black
Total.....$30,921.00

Included is the cost for the waste tire material $5,850.00
Included is the cost for the waste tire material delivery $1,625.00
100% of the waste tire material is generated in State of Missouri

Alternate Pricing
Sub-base includes remove and dispose of existing pea gravel surfacing and install a compacted rock sub-Base minimum 4" thick

Total.....$7,027.50

We appreciate the opportunity to bid on the above project. Please contact our office if you have any questions or need additional information. We look forward to doing business with you.

Sincerely.

Steven B. Bollinger
(636) 797-5820
(636) 797-5881 (Fax)
steve.bollinger@att.net

Quote 3:

Entire Recycling January 18, 2012

13974 US Hwy 136, Rock Port, MO 64482

Phone: 1-600-744-2252; Fax: 1-600-744-2732

Email: jim@entirerecycling.com

Trinity Lutheran Church Phone: 573-592-7866

Columbia, MO Cell: 573-310-1489

Phil Glenn, Project Coordinator

TOTAL 2811 SQUARE FEET OF PLAYGROUND AREA QUOTE

2" BASE + 1/2" CAP TOP COAT: 2 ½" Pour in Place in three areas

2811 sq. ft. our in place @ $9.50 per sq. ft. = $26,704.50 total project

1670 sq. ft. area:

85 bags SBR x 55 lb. per bag = 4675 lb. x .30 =	$1,402.50
167 bags of pad buffing x 50 lb. per bag = 8350 lb x .22 =	$1,837.00
2107 lb. urethane x 2.20 =	$4,635.40

650 sq. ft. area:

31 bags SBR x 55 lb. per bag = 1705 lb. x .30 =	$511.50
65 bags of pad buffing x 50 lb. per bag = 3250 lb x .22 =	$715.00
793 lb. urethane x 2.20 =	$1,744.60

491 sq. ft. area:

25 bags SBR x 55 lb. per bag = 1375 lb. x .30 =	$412.50
49 bags of pad buffing x 50 lb. per bag = 2450 lb x .22 =	$539.00
619 lb. urethane x 2.20 =	$1,361.80

Material Cost	$13,159.30
Estimated Delivery Cost	$ 1,000.00
Labor	$12,545.20
TOTAL COST OF PROJECT	$26,704.50

Approximately 1454 PTE's will be used in this project using 100% Missouri scrap tires. Our product is of the highest quality, being 99.9% free of all foreign matter such as steel, nylon, etc.

ATTACHMENT F
RECYCLING LESSON PLAN

Trinity Lutheran Child Learning Center
Weekly Planning Form - THEME: RECYCLING

Changes in learning centers:

Blocks: add recyclable items to this area – cartons, boxes, egg cartons

Dramatic play: children donate appropriate clothes for dress up area; add recycled plastic items to play kitchen area

Toys and games: paper towel rolls for binoculars, car tunnels

Art: piggy banks from recycled water bottles; recycled pp towel roll butterfly; use paper towel rolls, other items for printing; paper mosaic (cut up bright colored old TLCLC menus)

Library: add books on environment and how to recycle to the reading book area

Writing and discovery area: use all recycled paper, remind children of this talk

Sensory table: children bring in recycled items to use in sensory table; at end of week children place items in

Music and movement: Jack Johnson's song "Reduce, Reuse, Recycle"; use small plastic M&M containers for music shakers

Cooking/measuring: use water and paper towels conservatively to save on water and paper towels; make paste from flour and water to make a Paper Mache sculpture together – children decide theme

Playground: add various recycled plastic containers to sandbox for scoops; add various sized empty cardboard boxes to playground and on Friday children flatten boxes and take to church's large recycling bin for pick-up

Outdoors: go for nature walk; talk about nature vs manmade things we see; how can we take good care of everything?

Family & community involvement: reminders sent home for families to recycle at home and school; bring in recycled items on list for our art and block areas

Daily Plans:

Monday:

GROUP TIME (songs, stories, games, discussions, etc.	discuss reduce, reuse, recycle; acquaint them with sorting recyclables in ea. category; Game: listening outside sounds
STORY TIME - book	Michael Recycle by Ellie Bethel

SMALL GROUP ACTIVITIES	emphasize letter R; what sounds does it make? Recycle, Reuse, Reduce; choose one of the art activities above
SPECIAL ACTIVITIES (site visits, special events, etc.)	fine tune

Tuesday:

GROUP TIME (songs, stories, games, discussions, etc.	our earth: leaves, rocks, soil, wind, rain/snow, sunshine, clouds; how do we take care of our earth? What can we do to recycle and reuse things at school and at home? Remind children to recycle paper in classroom
STORY TIME - book	Biscuit's Earth Dav Celebration
SMALL GROUP ACTIVITIES	practice writing letter R in air, sand, carpet, table with finger paints
SPECIAL ACTIVITIES (site visits, special events, etc.)	go for nature walk; collect items for an art collage and pick up litter (teachers handle litter for sanitary reasons)

Wednesday:

GROUP TIME (songs, stories, games,	our earth: leaves, rocks, soil, wind, rain/snow,

discussions, etc.	sunshine, clouds; how do we take care of our earth? What can we do to recycle and reuse things at school and at home? Remind children to recycle paper in classroom
STORY TIME - book	Michael Recycle & The Tree Top Cops
SMALL GROUP ACTIVITIES	paint letter R using red colors (paint, crayons, markers); re-emphasize R
SPECIAL ACTIVITIES (site visits, special events, etc.)	go for nature walk; collect items for an art collage and pick up litter (teachers handle litter for sanitary reasons)

Thursday:

GROUP TIME (songs, stories, games, discussions, etc.	conclude all that we have learned from our topic of recycling, reusing, and reducing this week; some combined topic for two days due to some attending MWF, some T/TH, some M-F
STORY TIME - book	Michael Recycle & Litterbug Doug
SMALL GROUP ACTIVITIES	continue learning about R; what other words begin with R besides Recycle, Reuse, Reduce; choose art activity form list above

SPECIAL ACTIVITIES (site visits, special events)	

Friday:

GROUP TIME (songs, stories, games, discussions, etc.	conclude all that we have learned from our topic of recycling, reusing, and reducing this week; some combined topic for two days due to some attending MWF, some T/TH, some M-F
STORY TIME - book	The Garage Monster
SMALL GROUP ACTIVITIES	continue learning about R; what other words begin with R besides Recycle, Reuse, Reduce; choose art activity form list above
SPECIAL ACTIVITIES (site visits, special events, etc.)	Clean up the playground area of the cardboard boxes to recycle – flatten boxes

Lesson Plan Notes: Add to our art supplies: peanut butter jars, plastic soda bottles of various sizes, bubble wrap, pvc pipes, old measuring cups, film canisters, old sanitized toothbrushes (or new ones), magazines, newspapers, greeting cards, crepe paper, ribbon, wallpaper books, various sizes of grocer bags, old calendars, Pringle cans, cardboard boxes (various sizes), paper towel and toilet paper cardboard rolls, Kleenex boxes, colorful lids from laundry detergent bottles.

ATTACHMENT G
INFORMATION PLAN

Stakeholder/Audience: Television Viewers

1. How will information be used: To educate community residents on recycling opportunities

2. How will information be presented/ transmitted: News releases via Internet and/or phone contact with local TV stations to include KMOU(8), KMIZ(17), KNLJ(25), KQFX(22), KRCG(13)

3. Media and formats to be employed: On-site interviews, special interest segments, community events calendars

4. Reporting and distribution schedule/ frequency: During construction and at ribbon-cutting event when project is complete

5. Who will be presenting, communicating, transmitting: Local TV news anchors and correspondents; new releases by TLCLC

Stakeholder/Audience: Radio Listeners

1. How will information be used: To educate community residents on recycling opportunities

2. How will information be presented/ transmitted: News releases via Internet and/or phone contact with local and regional radio stations

to include LKPLA(FM); KATI(FM); KSSZ(FM); KMOX(AM); KWWR(FM); KFRU(AM)

3. Media and formats to be employed: On-site interviews, special interest segments, community events calendars

4. Reporting and distribution schedule/ frequency: During construction and at ribbon-cutting event when project is complete

5. Who will be presenting, communicating, transmitting: Local radio news reporters with on-site interviews, etc.; news releases by TLCLC

Stakeholder/Audience: News Print Readers

1. How will information be used: To educate community residents on recycling opportunities

2. How will information be presented/ transmitted: News releases to area newspapers and magazines, to include: Columbia Tribune; Columbia Missourian; Inside Columbia; Columbia Magazine .com

3. Media and formats to be employed: Special interest articles; community events calendars

4. Reporting and distribution schedule/ frequency: During construction and at ribbon-cutting event when project is complete

5. Who will be presenting, communicating, transmitting: News releases by TLCLC

Stakeholder/Audience: TLCLC Parents and Relatives

1. How will information be used: Inform parents of DNR grant program and recycling education efforts of TLCLC

2. How will information be presented/ transmitted: TLCLC newsletter and website

3. Media and formats to be employed: newsletter items; project progress on website

4. Reporting and distribution schedule/ frequency: Following grant award; during construction; ribbon-cutting event; post-construction recycling education

5. Who will be presenting, communicating, transmitting: TLCLC

Stakeholder/Audience: TLC Congregation

1. How will information be used: Inform congregation of DNR grant program and recycling education efforts of the TLCLC

2. How will information be presented/ transmitted: Weekly "Church News" newsletter and monthly "News of the Son" newsletter

3. Media and formats to be employed: Updates on project through completion

4. Reporting and distribution schedule/ frequency: Weekly and monthly through completion and ribbon-cutting ceremony

5. Who will be presenting, communicating, transmitting: TLCLC and Trinity Lutheran Church

ATTACHMENT H
SCOPE OF WORK

Task 1: Fall 2011 to Present - Planning of playground project completed by TLCLC administration and staff, Major Projects Coordinator, and TLCLC Board of Early Childhood Education.

Task 2: January 2012 – Completion of DNR grant application by Major Projects Coordinator.

Task 3: April 2012 - Contract with surfacing material vendor completed and materials ordered.

Task 4: April 2012 – Quarterly report due.

Task 5: May/June/July 2012 – Removal of old pea gravel surfacing material completed by TLCLC, parent volunteers, and church volunteers.

Task 6: May/June/July 2012 – Site excavated for proper slope, compacted aggregate base complete in accordance with manufacturer/vendor specifications.

Task 7: July 2012 – Quarterly report due.

Task 8: May/June/July 2012 – Installation of new pour-in-place material completed by selected vendor with the help of TLCLC and church volunteers as required.

Task 9: July/Aug 2012 – Playground cleanup and landscaping completed by TLCLC and church volunteers.

Task 10: August/September 2012 – Information plan implemented; grand opening / ribbon-cutting ceremony held.

Task 11: October 2012 – Final quarterly report due.

ATTACHMENT I
PROJECT TIMELINE GRAPH[2]

Task 1 to be completed in Project Month 1

Task 2 to be completed in Project Month 1

Task 3 to be completed in Project Month 4

Task 4 (chart blank for this task)

Task 5 to be in process in Project Months 5 through 7 with completion in Project Month 7

Task 6 to be in process in Project Months 5 through 7 with completion in Project Month 7

Task 7 (chart blank for this task)

Task 8 to be in process in Project Months 5 through 7 with completion in Project Month 7

Task 9 to be in process in Project Months 7 and 8 with completion in Project Month 8

Task 10 to be in process in Project Months 8and 9 with completion in Project Month 9

Quarterly Reports to be done in Project Months 4, 7, and 10

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[2] This Project Timeline Graph was originally in table form but has been revised for format purposes.

ATTACHMENT J
Scrap Tire Program Grant Application

1) Young Children Play Area

2) Older Children Play Area

Denial Letter to Trinity Lutheran Church from Missouri Department of Natural Resources

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES
Jeremiah W. (Jay) Nixon, Governor
Sara Parker Pauley, Director
www.dnr.mo.gov

May 21, 2012

Ms. Gail Schuster, Director
Trinity Lutheran Church Child Learning Center
2201 W. Rollins Road
Columbia, MO 65203

Re: 2012 Playground Scrap Tire Surface Material Grant – Applicant Number T12013

Dear Ms. Schuster:

Thank you for the time and effort you have taken to respond to the Missouri Department of Natural Resource's recent offering of financial assistance through the 2012 Playground Scrap Tire Surface Material Grants. The department appreciates your candor in explaining how the former "Trinity Lutheran Child Learning Center" was merged into the surviving corporation "Trinity Lutheran Church of Columbia, Missouri, Inc." back in the 1980s. However, after further review of applicable constitutional limitations, the department is unable

to provide this financial assistance directly to the church as contemplated by the grant application. Please note that Article 1, Section 7 of the Missouri Constitution specifically provides that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion..."

Again, thank you for your time and effort spent on applying for a Playground Scrap Tire surface Material Grant. If you have any questions or need further clarification, please contact Mr. Dan Fester of my staff at (573) 751-5401. Our mailing address is P.O. Box 176, Jefferson City, Missouri 65102-0176.

Sincerely,

SOLID WASTE MANAGEMENT PROGRAM

Chris Nagel
Director

CN:ktl

c: Mr. Phillip Glenn, Project Manager
Mid-Missouri Solid Waste Management District
Northeast Regional Office via Electronic Shared File

Explanation of Denial Email from Kim Tschirgi to Phil and Sylvia Glenn

Phil and Sylvia Glenn

From: "Tschirgi, Kim" <kim.tschirgi@dnr.mo.gov>
Date: 05/23/2012 6:22 AM
To: <glennhaven@ktis.net>
Subject: 2012 Playground Scrap Tire Surface Material Grant Ranking/Score – Trinity Lutheran Church Child Learning Center

Hi, Glen,

I have provided the scoring information you requested during our phone conversation yesterday.

Trinity Lutheran's application received 640 total points and ranked 5th out of 44 applications. The top score was 665 points.

We were able to fund 14 projects this year.

Thank you and have a great summer!

Sincerely,

Kim Tschirgi, Planner
SOLID WASTE MANAGEMENT PROGRAM
1730 E. Elm, lower level
P.O. Box 176
Jefferson City, MO 65102
573-751-5401